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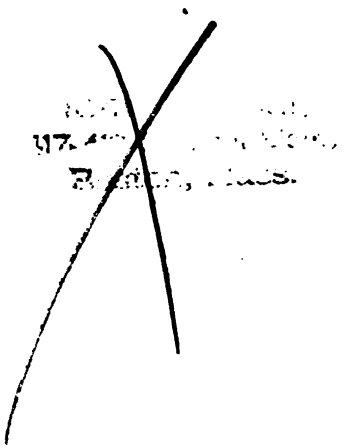

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MASSACHUSETTS REPORTS

145

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JUNE 1887 — JANUARY 1888

JOHN LATHROP

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

1888

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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HON. CHARLES DEVENS.
HON. WILLIAM ALLEN.
HON. CHARLES ALLEN.
HON. OLIVER WENDELL HOLMES, JR.
HON. WILLIAM S. GARDNER.
(Resigned, September 7, 1887.)
HON. MARCUS P. KNOWLTON.
(Appointed, September 14, 1887.)

ATTORNEYS GENERAL.

HON. EDGAR J. SHERMAN.
HON. ANDREW J. WATERMAN.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

JOHN LOWELL & others *vs.* THOMAS STRAHAN.
AUGUSTUS LOWELL *vs.* SAME.

Suffolk. March 3. — June 30, 1887. GARDNER, J., absent.

A lease of "the first floor" in a building includes the outside of the front wall of that part of the building, if there is nothing in the lease to control such construction.

An agreement by the lessee of a building to allow a third person, in consideration of an annual payment by him, to place a sign upon the outside wall of the building, for a stated time, is not a breach of a covenant in the lease not to underlet any part of the premises.

THE FIRST CASE was an action for money had and received, brought by the owners of a building in Boston against a lessee of a part of the building, to recover a sum of money which the lessee had received from a person whom he had allowed to place a sign on the outer wall of the part of the building leased to the defendant; and the case proceeded on the ground that the outer wall did not pass by the lease, but remained in the possession of the owners.

THE SECOND CASE was an action by the lessor (one of the plaintiffs in the first action) against the lessee, for breach of a covenant against underletting, and proceeded upon the ground

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that the outer wall was included in the lease, and that the act of the defendant in allowing the placing of the sign of the third person thereon was an underletting of the wall.

At the trial in the Superior Court, before *Bacon*, J., without a jury, it was agreed that the plaintiffs in the first case were the owners of the building, and that the second case should be treated as if the lease had been executed by all of the plaintiffs in the first case.

By the lease there was demised to the defendant, for the term of four years and eleven months from February 1, 1882, "the first floor and front part of basement in building situate on the northeasterly corner of Washington and Franklin streets in Boston." The lease contained a covenant on the part of the lessee to "keep all and singular the said premises in such repair as the same are in at the commencement of said term, or may be put in by the said lessor or his representatives during the continuance thereof; reasonable use and wear, and damage by accidental fire or other inevitable accidents, only excepted."

The lessee also covenanted to save the lessor harmless "from any claim or damage arising from neglect in not removing snow and ice from the roof of the building, or from the sidewalks bordering upon the premises so leased."

The lessee further covenanted that he would not "assign this lease, nor underlet the whole or any part of the said premises, nor make nor allow any unlawful, improper, or offensive use thereof, nor any alterations or additions during the term aforesaid, without the consent of the said lessor." And the lessor reserved the right "at seasonable times to enter into and upon the" premises "to examine the condition thereof."

It appeared in evidence, that, when the defendant took possession under the lease, there was a sign on the outside of one of the walls of the building, between the level of the floor and that of the ceiling of the first floor, which had been placed there by the firm of Jones, McDuffee, and Stratton, with the consent of the former tenant of the building; that the defendant made a contract with said firm, by which he agreed to allow their sign to remain upon said wall until February 1, 1886, in consideration of $150, payable in advance; that the defendant placed two signs, for his own use, upon the same part of the building, and

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agreed with certain other persons that they might paint over one of these with an inscription of their own, in consideration of $12.50 a month, payable in advance, so long as they should leave the same upon the building; and that, in pursuance of the first of these agreements, the defendant received $600, and in pursuance of the second, $75.

Upon these facts, the plaintiffs requested the following rulings: "1. The lease put in evidence in this case, covering only certain rooms in a building, gave the tenant no rights in the outside of the outer walls of the building, except a right to place upon them such a sign as was customary and reasonable for the advertisement of his own business. 2. The placing of other signs upon the outside of these walls was a trespass upon the property of the plaintiffs. 3. The defendant having leased the right to place signs upon these walls and received rent therefor, he is liable to the plaintiffs for the sums so received, and the plaintiffs may recover such sums in this action. 4. The agreements between the defendant and the persons who placed signs upon the walls were leases; and, if the lease to the defendant covered the outside walls, they were violations of his covenant not to underlet, for which he is liable to the landlord. 5. Under the circumstances of this case, the measure of damages is the amount of money the defendant received from the persons to whom he leased the right to place signs upon the walls."

The judge refused to give the rulings requested by the plaintiffs; ruled, as matter of law, that the outside of the walls in question was included in the lease, and that the agreements of the defendant with the persons whom he allowed to place or retain signs upon the building did not amount to an underletting; ordered judgment for the defendant in both actions; and, at the request of the plaintiffs, reported the case for the determination of this court.

A. L. Lowell, (*F. C. Lowell* with him,) for the plaintiffs. 1. Where the several rooms or stories of a building are let by separate leases, those parts of the building which are used in common by the tenants (such as the stairs, entries, and approaches) are not covered by the leases, but remain in the possession and control of the landlord. *Larue* v. *Farren Hotel Co.* 116 Mass. 67. *Readman* v. *Conway*, 126 Mass. 374. *Looney* v. *McLean*, 129 Mass.

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33. The same principle applies to the outer walls of the building, with their fixtures; for it is clearly settled that the occupant of a building, and not its owner, is liable for injuries arising from a lack of due care to keep it in a safe and proper condition, and that a tenant who has hired a whole building is the occupant of its outside walls, to the exclusion of the landlord. *Leonard* v. *Storer*, 115 Mass. 86. Yet it is equally clear that the owner of a building, who has let it in separate parts to different tenants, still retains the control of the exterior portions of the building, and remains the occupant of it, and is liable to any one injured through his neglect to keep these portions in a safe condition. *Kirby* v. *Boylston Market Association*, 14 Gray, 249. *Milford* v. *Holbrook*, 9 Allen, 17. *Shipley* v. *Fifty Associates*, 101 Mass. 251, and 106 Mass. 194. *Leonard* v. *Storer*, *ubi supra*. *Watkins* v. *Goodall*, 138 Mass. 533. *Donohue* v. *Kendall*, 18 Jones & Sp. 386. *Henkel* v. *Murr*, 31 Hun, 28. *M'Martin* v. *Hannay*, 10 Ct. of Sess. Cas. (3d ser.) 411.

No sound distinction can be drawn between the roof and the outer walls of a building. Every part of each is adjacent to some one story or room, and the remaining tenements do not need the shelter of one more than the support of the other.

In *Riddle* v. *Littlefield*, 53 N. H. 503, it does not appear that the court had under consideration the fact that the lease covered but a part of the building. This was not clearly stated in the lease, nor was it argued to the court or alluded to in the opinion. It does not seem to have occurred to any one that the rights and duties of landlords and tenants in a building let as a whole, are in any respect changed when the building is let piecemeal.

2. There is another class of cases which sustains the distinction just taken; namely, that, while the lessee of a whole building hires it, both inside and outside, together with the land upon which it stands, the lessee of a particular room hires only the inside of that room.

When a building is destroyed by fire, it is held that the lease of the whole of the building is not terminated by such destruction, on the ground that the land, as well as the building, is covered by the lease, and, though the building is destroyed, the lease still attaches to the land. *Rogers* v. *Snow*, 118 Mass. 118. On

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the other hand, it has been held that the destruction of a building terminates the lease of a room therein, because, as the subject of the lease has been destroyed, there is nothing to which the lease can attach. *Shawmut Bank* v. *Boston*, 118 Mass. 125.

If the outer walls are covered by a lease, and are not destroyed, it would seem that the lease should attach to them, and therefore it would not be terminated. These walls bear much the same relation to the room that the land does to the building. They are not, it is true, the principal thing leased, but neither is the land beneath a building in a city. It has been held, however, that the destruction of a building terminates a lease of the cellar and basement, although the brick walls are left standing around the demised premises. *Stockwell* v. *Hunter*, 11 Met. 448, 454. See also *Kerr* v. *Merchant's Exchange Co.* 3 Edw. Ch. 315; *Winton* v. *Cornish*, 5 Ohio, 477; *McMillan* v. *Solomon*, 42 Ala. 356; *Harrington* v. *Watson*, 11 Oregon, 143.

In several of the cases cited above, inasmuch as the leased premises included the ground floor of the building, the land also would have passed to the lessee under the decision in *Riddle* v. *Littlefield*, yet the lease was held to be terminated.

3. The only case in this Commonwealth in which the right of a tenant to place a sign upon the outside of a building was called in question, although not directly in point, sustains the contention of the plaintiffs in the case at bar. In *Pevey* v. *Skinner*, 116 Mass. 129, the lease to the plaintiff of rooms in the second story provided that "the lessee may have the right to place signs upon the outer wall of said rooms." The defendant had hired the lower floor of the same building, and it was held that, if the plaintiff could fully enjoy the privilege above granted without interference or obstruction from a sign which the defendant had placed upon this wall by a license from the landlord, then the grant of the privilege to the plaintiff could not be construed as a revocation of this license to the defendant. This decision could not have been made if the court had considered that outer walls are ordinarily covered by a lease of the rooms behind them. In such case the words of the lease would, at most, have limited the plaintiff's use of these walls to the placing of his own signs upon them, while the lease to him would have been in itself a revocation of the license to the defendant. Yet the court said in that

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case, that the defendants had a right to maintain the sign, even if this right arose from "a revocable license only." If the defendants had received from the landlord a mere license to put their sign upon the inside of the room, instead of upon the outside wall, it is inconceivable that a lease of the room to the plaintiff would not have revoked that license, no matter what restrictions had been placed upon the plaintiff's use of the room.

4. A tenant has, no doubt, the right to place on the outside of the building, for the advertisement of his own business, such sign or signs as are customary and reasonable; but this customary privilege is not a lease of the walls, and it gives the tenant no right therein, except that of displaying reasonable signs for his own use. If, therefore, the outside walls of a building are not covered by ordinary separate leases of the rooms or stories behind them, and if the defendant in this case cannot prove that the outside walls passed to him under some special provision of this particular lease, it is clear that his acts were a trespass upon the plaintiff's property.

The defendant relies on the provision in the lease which obliges him to keep the sidewalk and roof clear of ice and snow. But the purpose of this provision is obvious, and it cannot be supposed that the parties intended to include the roof and outer walls in the leased premises; for, if the roof and walls were covered by the lease, the covenants therein would apply to them, and the tenant would be bound to keep them in repair, as the lease provides. He would, moreover, be liable to a stranger injured by a fall of the outside wall from want of repair. It is obvious, however, that the tenant did not intend to assume any such responsibility for these parts of the building, and intended to confine his duties to the removal of ice and snow.

5. If the outer wall is a part of the premises leased, the defendant has violated his covenant not to underlet.

The distinction between a license and a lease consists in the fact, that the former gives no estate in the premises, but only a right of action in case of breach of the contract, while the latter confers a positive right to occupy the premises, irrevocable by the lessor, and available against strangers. The former, moreover, is terminated by the death of either of the parties, while the latter, giving an estate in the land, survives. But the question

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of lease or license is a question of intention, and there is no doubt that a definite part of the surface of a wall may be the subject of a lease if that is the intention of the parties. *Francis* v. *Hayward*, 22 Ch. D. 177. *Snyder* v. *Hersberg*, 11 Phila. 200.

In the case at bar, all the elements which constitute a lease were present. A fixed rent was reserved by the agreement. The premises covered by the contract were certain and definite, for it was agreed that the signs should remain upon the wall, and remain, of course, in their actual situation. It would clearly have been a breach of his agreement, if the defendant had moved the signs to less advantageous places upon the wall. These premises were to be in the exclusive occupation of the lessee, for it was not only clearly the intention of the parties, but, in the nature of things, inevitable, that the part of the surface of this wall covered by a sign should be used, enjoyed, and occupied only by the person whose advertisement was painted on that sign. Although the question whether a contract of this sort is a lease or a license has never arisen in the case of a sign, it has arisen under the laws for the assessment of poor-rates in England, in cases which bear a close resemblance to the case at bar. Thus, a contract by which the conservators of the Thames allowed a person to fix moorings in the river, to be removed on a week's notice, was held to be a lease, and not a license, and the lessee was held liable to be rated as an exclusive occupant of real estate. *Cory* v. *Bristow*, 2 App. Cas. 262. A decision to the same effect was given in a case where a telegraph company was permitted to erect posts and run wires along the track of a railroad, subject to removal upon notice. *Electric Telegraph Co.* v. *Overseers of Salford*, 11 Exch. 181. So, in a case still more nearly resembling the case at bar, where a telephone company ran wires overhead, and, by virtue of contracts with the owners of buildings, attached them to chimneys, roofs, walls, &c., by means of bolts, brackets, spikes, &c., the company paying rent and agreeing to remove upon a given notice. *Lancashire Telephone Co.* v. *Overseers of Manchester*, 14 Q. B. D. 267.

A. Hemenway & D. F. Kimball, for the defendant.

W. ALLEN, J. We think that the outside of the front wall was part of the premises demised in the lease of the first floor in

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the building. If the language had been used in a conveyance in fee simple, no question could have been made that the walls of the building were included. Undoubtedly, the owner of a building might, in conveying the lower and upper portions of it to different grantees, except the outside of the walls, as he might do in conveying the whole building to one grantee. In every case, it is a question of intention, found in the language used, as applied to the subject matter, and construed in connection with the whole instrument. A lease for years by indenture differs from a deed in fee simple, not only in the nature of the estate created, but also in the fact that the instrument of demise is an agreement between the parties containing mutual covenants affecting their rights in the premises. The words of description used should be construed in view of these considerations, which might require a different meaning to be given to them from what would be given to similar words in a conveyance in fee.

The words "first floor" in the building, are equivalent to "first story" of the building, and naturally include the walls. The apparent intention is to separate a section of the building as a distinct tenement. The words "first floor" define the lower and upper boundaries of this, but there is nothing to fix the lateral boundaries except the boundaries of the building. In this respect the words differ somewhat from the word "room." "Floor" means a section of the building between horizontal planes. The words "in building" show that the section is of the whole building, and not of a part of it. The word "room" includes a description of the perpendicular as well as of the horizontal planes which bound the parcel of the house described by it, and excludes the outside of lateral walls, at least when they constitute the walls of another room, as clearly as the words "first floor" exclude the flooring of the story above it. Under what circumstances a lease of a story of a building would include a space beyond the building over land belonging to it, need not be considered. In this case, the building adjoins the sidewalk, and the words "first floor in building" must be held to include the entire front wall of that part of the building, unless there is something to control the natural meaning of the language.

That the outside of the front wall would be valuable to the lessee as part of the premises, and that the lease gives him the

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right to use it for some purposes, such as putting out signs and displaying goods, is not disputed; but it is contended that the right is a privilege or easement appurtenant to the leased premises in a part of the building, not parcel of them. The defendant contends, on the other hand, that the outside of the front wall is parcel of the leased premises. It often occurs in leases of part of a building that rights in other parts, or in land not parcel of the premises, as in entries, passageways, and yards, pass as appurtenant to them. The question in such cases generally is, not what is parcel of the demised premises, but what is incident to them. In general, a deed or lease of a house or store will include the land under it.

In *Stockwell* v. *Hunter*, 11 Met. 448, and in *Shawmut Bank* v. *Boston*, 118 Mass. 125, it was held that the land under a building would not pass as parcel of the premises in a lease of the basement of a building, the upper stories of which were let to other tenants. In the first case, Mr. Justice Dewey said: "The proper construction of such a lease as the present, as it seems to us, is, that the lessee's right of occupation of the land is an interest, for the time being, defeasible by the destruction of the building by fire." 11 Met. 456. In the latter case, Mr. Justice Morton said: "The real question is whether the intention of the parties, to be collected from the whole lease, was to grant to the lessees any estate in the land itself. As we have seen, the lease does not in terms grant any estate in the land. . . . . In cases where different rooms in the same building are leased to separate tenants, the situation of the property and the nature of the tenures exclude the idea that each tenant takes an estate for years in the land. Such estates existing at the same time in different tenants are inconsistent and impossible. . . . . The bank and Lawrence cannot both take an estate for years of the same land." 118 Mass. 129, 130.

In the case at bar, the words of description naturally include the premises in question, the outer walls. It is plain that the lease grants not merely an interest in the walls, like the incidental right of support or shelter which it grants in the land and other parts of the house, but the right to use and enjoy, as leased premises, for the purposes of business. That right is exclusive. The landlord has no right to use or to let it for such

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purposes. From the mere demise, without regard to special provisions of the lease, there is no reason that the landlord should be regarded as having rights in the outside different from what he has in the inside of the wall. As owner of the upper tenement, he has a right in the whole wall for support, but that right would not operate to except the walls by implication from a deed in fee of the lower tenement, or from a grant of it for years. The occasions that the reversioner would have to enter upon the wall of the demised tenement must be few and extraordinary, and it could not be inferred, from the fact that the right was not expressly reserved in the lease, that the wall was excepted from it. We can see nothing in the nature of the estate granted, therefore, that should prevent the outer wall from being included as parcel of the demised premises. On the contrary, the fact that it is of value to the tenant for the use for which the premises may be occupied, and of no value for use to the landlord, would indicate that it was part of the premises, if the description was doubtful. If it did not pass by the lease in this case, it would seem that the right which the plaintiff claims could be maintained. The only right of the tenant would be to make such use of it as would be incident to his grant of the adjoining premises, and the right of the landlord would be to enter upon it, and make any use of it not inconsistent with the incidental rights of the tenant to use it. He might not have a right to take down the tenant's sign, but he would have the possession of the wall, and the right to enter upon it, and to use any of it not actually used by the tenant, for any purpose not inconsistent with the use by the tenant of the leased premises. It is not reasonable to suppose that this was the intention of either party. The actual possession and use of the wall by the tenant which the parties obviously intended are substantially that of leased premises, and it would be very difficult to define or fix the respective rights of the parties in it, except on the assumption that it is a part of the demised premises.

There is nothing in the particular provisions of the lease that bears with much force upon the question. The covenant of the lessee to repair is what would be expected, whether the outside of the wall were included or not, unless the suggestion is entitled to some weight, that, if the outer surface of the wall was not

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included, the lessor would probably have insisted upon a special covenant by the lessee to keep it in repair. Perhaps the covenant by the lessee to save the lessor harmless from all damages arising from neglect in not removing snow and ice from the roof of the building, or "from the sidewalks bordering on the premises so leased," may afford a slight inference that the wall, including the outer surface of it, was part of the premises. The covenants by the lessee not to underlet, and not to make any unlawful, improper, or offensive use of the premises, nor any alterations or additions, and that the lessor may enter upon the premises to examine the condition thereof, while proper to protect the interest of the reversioner in the surface of the wall do not appear to have particular reference to that. We can find nothing in the lease which militates against the idea that the whole outer wall is included in the premises; and the description of the premises as applied to the subject matter, and the right in the outer surface of the wall, which it is reasonable to suppose the parties intended that the lessee should have, and the entire reasonableness that the whole of the front wall of that part of the building should be included in the lease of a floor or story of it, in connection with the particular provisions of the lease, lead us to the conclusion that the outer surface of the wall was part of the demised premises.

We find no authority against the conclusion we have reached. *Pevey* v. *Skinner*, 116 Mass. 129, decided that, where different rooms in a building were let to different tenants, a license by the owner of the building to the tenant of a lower room to place his sign on the outer wall of the building extending fifteen inches higher than the floor of the room above, was not revoked by a lease of the room above, which contained the provision that "the lessee may have the right to place signs upon the outer wall of said rooms." The general right in the outer wall of the lessee of a single room was not considered. The court said, "His right to use the outer surface of the wall was defined, and thereby limited, by the terms of the lease." The decision can have very little bearing upon the lease of a "floor," which does not define and limit the right to use the outer wall.

Riddle v. *Littlefield*, 53 N. H. 503, and *Baldwin* v. *Morgan*, 43 Hun, 355, are directly in favor of our conclusion.

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Loring v. *Bacon*, 4 Mass. 575, and *Cheeseborough* v. *Green*, 10 Conn. 319, are cases where the respective rights of owners of lower and upper tenements in the same building are considered, but have no particular bearing upon the case at bar.

It is contended that the agreement of the defendant to allow the sign of a stranger, in consideration of an annual payment by him, to remain upon the outside wall demised, was a breach of the covenant in the lease not to underlet any part of the premises. But this was a license, and not a lease. It was permission to do a particular act, namely, to affix a sign to the wall, and gave no authority to do any other act upon the premises. The fact that the permission was paid for, and that the act permitted was a continuing one, are ordinary elements of a license. Every license to do an act upon land involves the exclusive occupation of the land by the licensee, so far as is necessary to do the act, and no further. A lease gives the right of possession of the land, and the exclusive occupation of it for all purposes not prohibited by its terms. It is clear in this case that the intention was that the licensee should have no other right in the premises than to affix his sign to them, and that every other right should remain in the defendant. An agreement of this nature cannot be construed as a lease; it must create either a license or an easement.

In *Pevey* v. *Skinner*, *ubi supra*, it was said that permitting a sign to be kept upon the wall for a long time would imply a license, but it was not intimated that it would imply a lease of the outer surface. We have not been referred to any case in which the question here presented, or any closely resembling it, has arisen. Numerous cases have arisen in England where the question was whether persons occupying land under particular agreements were liable to be rated as occupiers. See *Cory* v. *Bristow*, 2 App. Cas. 262; *Electric Telegraph Co.* v. *Overseers of Salford*, 11 Exch. 181; *Lancaster Telephone Co.* v. *Overseers of Manchester*, 14 Q. B. D. 267; *Watkins* v. *Overseers of Milton-next-Gravesend*, L. R. 3 Q. B. 350; *Forrest* v. *Overseers of Greenwich*, 8 E. & B. 890.

In *Selby* v. *Greaves*, L. R. 3 C. P. 594, the letting of a defined portion of a room in a factory with steam-power for working lace machines was held to be a demise; and in *Hancock* v. *Austin*, 14 C. B. (N. S.) 634, permission to place lace machines in a room

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in a factory, and to work them with steam-power furnished by the owner of the factory, was held to be a license, and to create no demise. The case last cited approaches nearest to the case at bar of any that we have seen, and in that the reasons for regarding the transaction as a lease are obviously stronger than in this case. That was permission to occupy with fixed machines a portion of the floor and space above it; this is permission to insert fastenings in the outer wall from which to suspend a sign in proximity to, but outside of, the building.

Judgments affirmed.

ARTHUR W. BLAKE & another, executors, *vs.* TRADERS' NATIONAL BANK.

Suffolk. March 14, 15. — June 30, 1887. FIELD, C. ALLEN, & GARDNER, JJ., absent.

A trustee pledged to a bank certain shares of stock belonging to a trust estate as security for the payment of a debt due from him to the bank, the certificate and the assignment of the shares showing that it was held in trust. The bank was subsequently organized as a national bank, received the shares, and, at the request of the trustee, sold the shares and applied the proceeds on the debt, the trust estate receiving no benefit therefrom. The trustee was removed and a new trustee appointed in his place. A surety on the original trustee's bond was compelled, in an action upon the bond, brought in the name of the judge of probate, to pay to the trust estate the value of the stock. *Held*, that the surety was subrogated to the rights of the new trustee and of the *cestuis que trust*, and could maintain a bill in equity against the national bank to recover the amount so paid by him.

A. became a surety on a trustee's bond in 1855. The only account rendered by the trustee in the Probate Court was allowed in 1856, but he from time to time rendered accounts to the *cestuis que trust*, and paid to them the balances appearing to be due. In 1858, A. received from the trustee certain security, which was believed by all parties to be ample, and which A. surrendered upon being discharged from the probate bond in 1869. In 1864, the trustee pledged to a bank certain stock belonging to the trust estate as security for the payment of a debt due from him to the bank. The certificate and assignment of the stock showed that it was held in trust. In 1867, the bank, at the request of the trustee, sold the stock and applied the proceeds on the debt, the trust estate receiving no benefit therefrom. The trustee was afterwards removed, and a new trustee appointed in his place. It appeared by the accounts rendered by the original trustee that the stock was held by him, and the *cestuis que trust* did not know of the breach of trust until August, 1877. In November, 1877, before the removal

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of the original trustee, an action was commenced upon his bond by order of the Probate Court for the benefit of the *cestuis que trust*, which was prosecuted by the new trustee. A. defended the action, on the ground that he had been released as surety, but judgment was rendered against him, in 1882, for the penal sum of the bond; and execution issued for the value of the stock, which was paid by A. In 1884, after such payment, A. brought a bill in equity against the bank to recover the amount so paid by him. *Held*, that the statute of limitations was not a bar to the suit; and that there was not such laches as would prevent A. from recovering.

W. ALLEN, J. In 1855, the plaintiffs' testator became a surety upon the probate bond of a trustee. In 1864, the trustee pledged certain stocks, a part of the trust estate, to the Traders' Bank, to secure a debt due from the firm of which he was a member. In 1865, the Traders' Bank was organized as the Traders' National Bank, the defendant, and received the stock in question, the debt not being paid. In 1867, the defendant, at the request of the trustee, sold the stock and applied the proceeds on the debt. The certificate and the assignment showed that the stock was held in trust. The trust estate received no benefit from the pledge or the sale of the stock. The trustee was afterwards removed, and new trustees were appointed in his place. Before the removal of the trustee, suit was commenced against the plaintiffs on the bond, which was prosecuted after the appointment of the new trustees, and judgment recovered, upon which execution issued for the value of the stocks, among other things, and the judgment was paid by the plaintiffs. These facts show that the defendant received and sold the stocks, with notice of the trust, and was liable to the new trustees, and to the *cestuis que trust* for the avails. *Shaw* v. *Spencer*, 100 Mass. 382. *Loring* v. *Brodie*, 134 Mass. 453. *Montreal Bank* v. *Sweeny*, 12 App. Cas. 617.

The general rule, as stated by Lord Brougham in *Hodgson* v. *Shaw*, 3 Myl. & K. 183, 190, is, "that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement." In this case, the judge of probate was the obligee in the bond which constituted the debt, but it was for the benefit of the trust estate, and the legal and beneficial owners of that estate were the real creditors, to whose rights the surety would be subrogated on paying the debt. It is true that the trustees elected to pursue their remedy upon the bond against the surety,

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and neither the trustees nor the *cestuis que trust* would have a right of action against the defendant, after full indemnity had been obtained in the action on the bond; but there was no other election of remedy, or discharge or satisfaction of a cause of action, than is always the case when a creditor who holds collateral security for a debt gets satisfaction from a surety of the debtor. The surety takes the place of the creditor as to the debt, and as to the security. See cases cited in notes to *Dering* v. *Winchelsea*, 1 White & Tudor's Lead. Cas. in Eq. (6th ed.) 114. If, as is argued, the original trustee had no right of action against the defendant, and the stock was not his property, and was not pledged by him as security for the debt which the plaintiffs paid, and if the defendant was only liable to the new trustees as holding, or for having converted, the trust fund, and if the fund was made good by the payment to the trustees by the surety, it would make no difference. The payment was to the trustees, and was a substitute for the fund which was in the hands of the defendant, and which it was bound to account for to the trustees, and would give to the surety all the rights which the trustees had to recover the fund; it would operate as an assignment to the surety of the fund, and of the right of action of the trustees to recover it. In this case, the defendant and the surety were both liable to the trustees for the amount of the trust property; the former, in consequence of participating in the wrongful act of the first trustee; and the latter, by his contract to indemnify the estate against such act. The cases are analogous where one owner of property has claims for a loss against an insurer and a tortfeasor. The insurer is in the nature of a surety, and, upon paying the loss, he is subrogated to the rights of the owner to recover for the tort. *Hart* v. *Western Railroad*, 13 Met. 99. *Clark* v. *Wilson*, 103 Mass. 219. *Mercantile Ins. Co.* v. *Clark*, 118 Mass. 288. The cases cited in Sheldon on Subrogation, § 89, sustain the proposition in the text, that, "where the sureties of a trustee have been compelled to answer for his breach of trust, they are subrogated to the rights of both the trustee and the *cestui que trust* against those who have participated in his wrongful acts."

The defendant bank contends that the right of action to which the surety was subrogated was barred by the statute of

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limitations. The bank took the stock charged with the trust, and it held the specific property, and the proceeds of the sale of it, as a trust fund, under a trust to return it to the trustees. The trustees and *cestuis que trust* both had an equitable remedy against it as such trustee. This remedy would not be affected by the statute of limitations. 1 Perry on Trusts, § 217. 2 Ib. § 828.

Whether an action of tort for the conversion of the stock would be barred, we need not consider. If the trustees could have elected to sue the defendant for damages for the sale and conversion of the stock, they did not do so, and no question arises as to the effect of such election upon the right of the trustees or of the *cestuis que trust* to treat the proceeds of the sale as trust money to which they were entitled. Their right of action against the defendant to compel it to account for and restore trust property which it knowingly received and withheld, is a right to which a surety on the bond, who was compelled to make good the amount to the fund, would be subrogated.

It is contended that there was such delay and laches on the part of the plaintiffs, and of those under whom they claim, as to prevent a recovery. The surety was released from the bond by order of the Probate Court, on May 9, 1869. The only account rendered by the trustee in the Probate Court was allowed on December 8, 1856, but he from time to time rendered accounts to the *cestuis que trust*, and paid to them the balances appearing to be due. It appeared by these accounts that the stock in question was held by the trustee, and the *cestuis que trust* did not know of the breach of trust until August, 1877. In November, 1877, a suit on the bond was commenced against the plaintiffs, by order of the Probate Court, for the benefit of the *cestuis que trust*. The plaintiffs defended this action, on the ground that the surety had been released, but judgment was rendered for the plaintiff for the penal sum of the bond, in March, 1882. The amount for which execution should issue was not fixed until after this bill was brought. Before then, namely, on June 27, 1884, the plaintiffs had paid to the trustees the amount claimed from the defendant, and they have since paid the whole amount found due upon the bond. This bill in equity was filed on June 27, 1884.

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There was not such laches on the part of the *cestuis que trust* in failing to have the trustee summoned to render an account in the Probate Court, as would prevent them from following the fund in the hands of the bank. They had no reason to suppose that everything was not right until August, 1877. Soon after that, the action on the bond was commenced. Neither they nor the trustees lost one remedy by not pursuing both at the same time. The plaintiffs were justified in the delay necessary to defend that suit, and, within a reasonable time after their liability was declared, they brought this bill. The delinquent trustee was removed, and new trustees were appointed, on July 1, 1878. The new trustees found the suit on the bond pending, and there was no occasion for them to take any further steps. It does not appear that the delay has been unreasonable, or that it has been any detriment to the defendant bank; and it would be inequitable to deprive the plaintiffs of their remedy on account of it.

In 1858, the surety received from the trustee security in the form of the bond of one Bacon for $50,000, which he surrendered when he was discharged from the probate bond in 1869. There is no doubt that this surrender was made in the belief that there had been no breach of the bond, and that the surety was not liable upon it. There is nothing in the evidence to show the value of the bond when it was surrendered, except the statement, referring to the time when the security was received, that it was believed by all parties to be ample. The surety did not stand in the relation of a co-surety with the defendant, and there was no misconduct or negligence by him in regard to it shown.

On the whole, the plaintiffs are entitled to recover from the defendant bank the amount for which the stock was sold by it, with interest from the time of the sale.

Decree for the plaintiffs.

M. Storey, for the plaintiffs.

E. R. Hoar & H. G. Parker, for the defendant.

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HELEN M. KEITH *vs.* CHARLES H. MCCAFFREY.

Suffolk. March 7. — July 1, 1887. FIELD, C. ALLEN, & GARDNER, JJ., absent.

It seems, that the Pub. Sts. *c.* 171, § 1, providing that "the court may enter up judgment upon default at any time after four days from the day of default," do not apply to proceedings upon a complaint under the bastardy act, Pub. Sts. *c.* 85; and that a judgment in such proceedings is not irregular because entered on the day of a default.

If the respondent in a bastardy complaint appears and answers, and is defaulted because not present when the case is called for trial, and judgment is entered on the default, and he did not intend to make default, and his absence is reasonably explained, and if, at a hearing upon his motion that the judgment be vacated, made at the same term of the court at which the judgment was entered, he shows circumstances from which the judge finds that the judgment ought to be vacated and a trial allowed, it is within the authority of the judge to find that the judgment was rendered by mistake, and to bring forward the case and vacate the judgment.

W. ALLEN, J. The respondent in a complaint under the bastardy act, Pub. Sts. *c.* 85, was defaulted for failing to appear when the case was called for trial, and, on the same day, a judgment was entered against him. Subsequently, at the same term, he made a motion that the judgment be vacated, for the reason that it was entered by mistake. After a hearing upon the motion, the judge filed a ruling, which recited that he was not satisfied that the judgment was entered by mistake, or was irregular, and stated certain facts or findings in regard to the default, and concluded in these words: "I deny the motion for the reason that I doubt the authority of the court to grant in this manner the relief sought for." We understand the question intended to be presented by the ruling, which is in the nature of a report of the case, to be, whether, upon the record and the statements in the ruling, the court had authority to grant the motion. The court did not find as a fact that the judgment was, or that it was not, entered by mistake. The principal mistake relied on by the respondent was in irregularly and inadvertently entering the judgment within four days after the default, in disregard of the Pub. Sts. *c.* 171, § 1. This would be a mistake of the court in irregularly rendering the judgment. The other mistake suggested was, not of the court in entering the judgment, but of the

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respondent in suffering the default upon which the judgment was founded. We understand the ruling of the judge, that he was not satisfied that the judgment was entered by mistake or was irregular, to have more particular reference to the former of the alleged mistakes, and to have been intended as a ruling that there was no irregularity found, and not a finding of fact that the judgment was not entered by mistake; and the whole ruling to present the questions whether, by reason of the supposed irregularity, or of the facts and findings relative to the default, the court had authority to find that the judgment was rendered by mistake, and to vacate it for that reason.

Upon the first question, we are inclined to think that the Pub. Sts. *c.* 171, § 1, do not apply to these proceedings, and that the judgment was not irregular because entered on the day of the default.

In regard to the other question, we think that the facts stated are sufficient to authorize a finding that the judgment was entered by mistake.

The authority of a court over a judgment which it has rendered, to bring the cause forward and vacate the judgment for the reason that it was entered by fraud, or by the mistake of the court or of the party, is well settled. *Edson* v. *Edson*, 108 Mass. 590. *Marshall* v. *Merritt*, 103 Mass. 45. *Stickney* v. *Davis*, 17 Pick. 169. *Capen* v. *Stoughton*, 16 Gray, 364. *Commonwealth* v. *Weymouth*, 2 Allen, 144. *Mason* v. *Pearson*, 118 Mass. 61. *Cannan* v. *Reynolds*, 5 El. & Bl. 301. *Atwood* v. *Chichester*, 3 Q. B. D. 722.

It is not necessary that the mistake should be of the court, or in the mere rendering or entry of the judgment. A judgment regularly entered upon a default suffered by mistake, may be said to be rendered by mistake. When, as in this case, a party appears and answers, and is defaulted because he is not present when the case is called for trial, and judgment is entered on the default, when he did not intend to make default, and his absence is reasonably explained, and he shows circumstances from which the court finds that the judgment ought to be vacated and a trial allowed, we think that the court might and ought to find that the judgment was rendered by mistake. It would be within the authority and in the discretion of the court to bring forward the

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case and vacate the judgment for that reason. One consideration, among many others, in determining that discretion would be the lapse of time after the judgment was entered; another would be the sufficiency of other remedies. Without regard to the question whether the Pub. Sts. *c.* 187, § 17, include the judgment in this case, and provide another remedy, and having regard to the fact that the motion to vacate the judgment was made at the same term or sitting of the court at which the judgment was entered, we have no doubt that the court had authority to bring forward the case and vacate the judgment, either on petition or on motion. *Exceptions sustained.*

G. B. Upham & F. W. Proctor, for the respondent.

T. E. Barry, for the complainant.

JAMES P. HAMILTON & another *vs.* MICHAEL J. McLAUGHLIN.

Suffolk. March 8. — July 1, 1887. FIELD, C. ALLEN, & GARDNER, JJ., absent.

If the keeper of a livery stable, who, upon learning that a horse in his stable belongs to another person, notifies the owner that the horse is there, and states the amount due for its board, refuses, upon the demand of the owner a few weeks later, to deliver the horse to him unless the whole bill for its board is paid, he waives whatever lien he may have for the board of the horse after the notice to the owner.

In an action for the conversion of personal property, a mortgage of the property to the plaintiff, purporting to be executed in the name of a corporation by its president and under its corporate seal, is sufficient *prima facie* evidence of the incorporation, and of the authority of the president to execute the mortgage.

TORT, for the conversion of a horse. Writ dated August 30, 1884. Answer, a general denial, and a claim of a lien upon the horse for its board and keeping.

At the trial in the Superior Court, before *Knowlton*, J., the plaintiffs put in evidence a mortgage to them, purporting to be executed by "the Worcester Herdic Phaeton Company, a corporation duly established by law," and to be signed, in the name

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of the company by its president, and sealed with the corporate seal of the company. This mortgage was dated April 15, 1882, and covered one hundred horses and other personal property. It was admitted that the condition of the mortgage was broken.

There was also evidence that the horse in question had been placed in the defendant's livery stable by a man who had hired it from a person who represented the Worcester Herdic Phaeton Company; that the defendant wrote to an agent of the company stating that he had the horse, and naming the amount due for board; and that two or three weeks after that the agent called and demanded the horse, and the defendant refused to give it up, unless the entire bill for board, about $40, was paid.

The plaintiffs contended that the horse was taken to the defendant's stable without the knowledge or consent of the plaintiffs, and that therefore no lien would run against them. Upon this branch of the case, the judge instructed the jury that, if the horse was taken to the defendant's stable with the express or implied consent of the plaintiffs, they could not recover; and instructed them what would constitute implied consent, in terms not excepted to.

The defendant contended that, even though there was no lien prior to the notice to the plaintiffs' agent, there would be a lien for the term subsequent to the notice; and requested the following instructions: "1. It is incumbent upon the plaintiffs to prove that the mortgage was, at the time of the bringing of this suit or the refusal to deliver the horse, a valid existing mortgage; and incident thereto it is their duty to prove that the Worcester Herdic Phaeton Company was a corporation duly established by law, and that the person signing the name of said company to this mortgage had authority by vote of that corporation so to do. A failure of such proof is fatal to the plaintiffs' case. 2. If the jury find that the duly authorized agent of the plaintiffs was notified by the defendant that their horse was at his stable, and they saw fit to permit the horse to remain with the defendant for one or two weeks after such notice, the law implies a promise to pay for the keep of the horse for that period at least, and would entitle the defendant to a lien for that period against the plaintiffs. 3. If, at the time of the demand upon the defendant by the plaintiffs for the horse, there was any

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sum due for board after notice to them that their horse was in his possession, he has a lien on the horse, and was entitled to hold the horse until his claim was satisfied."

The judge gave the first ruling requested, but added: "I also instruct you that the introduction of the mortgage in evidence is sufficient to allow you to find those facts. The signature and seal appear to be regular and proper, and are sufficient *prima facie* evidence to establish their claim unless attacked." The judge declined to give the other instructions requested, and gave no equivalent instructions.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

P. A. Collins & J. H. Burke, (*G. A. Griffin* with them,) for the defendant.

W. B. Orcutt, for the plaintiffs.

W. ALLEN, J. The only lien which the defendant claims is for keeping the horse after notice to the plaintiffs, and a request to take it away. Whether the evidence was sufficient to prove that he had such a lien, and whether the instructions asked in regard to it were sound, we do not find it necessary to consider. It is immaterial that the defendant had a lien, if he waived it at the time of the demand. A claim to hold the possession of the property, and a refusal to deliver it on demand under and in assertion of a right other than that given by the lien, would be evidence of a conversion. There is no dispute about the facts. When the defendant notified the plaintiffs that the horse was at livery with him, he stated the amount of board due. When the demand was made by the plaintiffs' agent a few weeks later, the defendant refused to deliver the horse unless the whole bill for its board, amounting to about $40, was paid. He made no distinction between what occurred before and what occurred after the notice to the plaintiffs, but demanded the whole in one sum and as one debt. Had he claimed distinct liens for distinct debts, for what occurred before and what occurred after the notice to the plaintiffs, it may be that he would not thereby have waived a valid lien for one of the debts only, without the refusal of a tender of that alone; but the demand for the whole as one debt, and the refusal to deliver the property unless the whole was paid, was a refusal to deliver the

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property upon the payment of the amount which had accrued after the notice, or to accept a tender of that, and rendered a tender of it unnecessary. *Jones* v. *Tarleton*, 9 M. & W. 675. *The Norway*, Br. & Lush. 404. *Kerford* v. *Mondel*, 5 H. & N. 931. *Dirks* v. *Richards*, 4 Man. & Gr. 574. *Scarfe* v. *Morgan*, 4 M. & W. 270.

The evidence of the plaintiffs' title was sufficient, and there was no error in the instructions in regard to it.

Exceptions overruled.

ADDISON A. REEVE *vs.* HERBERT E. DENNETT.

Suffolk. March 18, 21. — July 1, 1887. FIELD, C. ALLEN, & GARDNER, JJ., absent.

In an action for fraudulent representations as to the value of shares of stock in a corporation formed to promote the use in dentistry of a compound invented by the defendant, a dentist, the plaintiff's evidence tended to show that the compound was worthless for the purpose of allaying pain, for which it was intended to be used. The defendant was allowed to introduce the evidence of a number of his patients, who testified that the defendant's operations upon their teeth, using his invention, were practically painless, whereas similar operations before had been very painful. *Held*, that the plaintiff had no ground of exception.

At the trial of an action, if evidence is admitted subject to another witness being called to prove a certain fact, and the case is closed without the witness being called, and the adverse party makes no request to have the evidence stricken out or the jury instructed to disregard it, he has no ground of exception.

In an action for fraudulent representations as to the value of shares of stock in a corporation, if there is evidence tending to show that the defendant made such false representations at a certain time for the purpose of inducing the plaintiff to buy some of the stock, it cannot be said, as matter of law, that such representations may not have continued to operate in the plaintiff's mind eleven months afterwards, and may not have induced him to accept more stock, even if he had become a director in the corporation and had acquired independent means of knowledge in the mean time, if in fact he continued to rely upon the defendant's statements in dealing with him.

In an action for fraudulent representations, if there is evidence tending to show that the defendant made false representations to the plaintiff as to the defendant's ownership of certain land in order to induce the plaintiff to advance money to the defendant, it cannot be said, as matter of law, that the representations were made good by a purchase of the land by the defendant before the plaintiff had acted upon the representations, if in the purchase the greater part of the price was secured by a mortgage on the land.

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At the trial of an action for fraudulent representations as to the value of shares of stock in a corporation formed to promote the use in dentistry of a compound invented by the defendant, for which letters patent had been obtained, the plaintiff's evidence tended to show that the defendant's invention was merely a mixture of ingredients, all of which had been used long before in dentistry; and that the compound was worthless for the purpose for which it was intended to be used. The defendant asked the judge to instruct the jury that there was no evidence of a want of novelty in his invention; but the judge refused so to do. *Held*, that the defendant had no ground of exception.

In an action for fraudulent representations, alleged to have induced the plaintiff to take certain shares of stock and to borrow a sum of money, with a pledge of the stock as collateral security, which he paid to the defendant, the plaintiff's failure to prove that he pledged stock to secure the loan to him is not material, if he proves the defendant's fraud and his own advance of money on the faith of it.

If the declaration in an action contains counts in contract and counts in tort, and the plaintiff, by order of the judge, elects to proceed to trial on the counts in tort, the refusal of the judge to order the counts in contract stricken from the record is no ground for a new trial.

CONTRACT, with counts in tort.

The fourth and fifth counts, upon which alone the trial proceeded, were as follows:

Fourth count. "The plaintiff says that early in the year 1880 the defendant promoted, organized, and set up a bubble company, called the Dennett Dental Naboli Company; that said company was pretended to be organized under the laws of Connecticut, and was pretended by the defendant to have a capital of $1,000,000, fully paid up; that the defendant having offered to sell to the plaintiff six hundred shares of the capital stock of said corporation of the par value of $25 a share, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that the capital stock of said company was $1,000,000; that it was all paid in; that said stock was of the market value of $15 a share; that it was in great demand at that price; that all the treasury stock of said company could be sold at that time for $15 a share; that it had sold at that price until the company had funds enough on hand in its treasury, and it had now refused to sell any more at $15 a share, and had advanced the price to $20 a share; that he had paid all charges, calls, and assessments laid or to be laid upon said shares by said company or the directors thereof; that said company was in a sound financial condition, and that it had property which made the stock then worth $15 a share, and had made such business

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contracts and engagements as would insure a rapid advance beyond said price; that the defendant was the president of said company, and knew that said company was solvent and responsible, with large business, and that it was a safe and profitable investment at $15 a share. And to further induce the plaintiff to purchase said stocks, the defendant offered and proposed to borrow from the plaintiff the sum of $3000 as a loan, and deliver to the plaintiff six hundred shares of said stock, as security for said loan, and gave the plaintiff the right to purchase said six hundred shares at $15 a share, or to return said stock to the defendant at the plaintiff's election; and the defendant agreed, if the plaintiff elected to return said stock, to repay the said $3000 and interest on the same, during the continuance of the loan, until the plaintiff should make his election.

"And the plaintiff says that, relying upon said representations of the defendant, and believing them to be true, on or about the first day of June, 1880, he loaned the defendant the sum of $3000, upon the terms so proposed by the defendant; but that the defendant wholly neglected to deliver the plaintiff the six hundred shares of said stock, or any shares, and that the plaintiff received none of said stock until October, 1880; that in truth, and as the defendant then well knew, all the representations made by the defendant to the plaintiff were false, and were made solely with intent to deceive and defraud the plaintiff, and to get possession of the plaintiff's money. And the said Dennett Dental Naboli Company was a bubble company, and organized fraudulently, without any capital whatever; that no capital was ever paid in; that it never had so much as $1000 in its treasury at any time; that its stock was worthless, and never had any market value, or any value whatever; that it never sold for $15 a share, unless by fraud and deceit, and not at a fair sale in the open market; that it never had any business; that it was never upon a sound financial basis, but, on the contrary, the said company was then insolvent and the stock worthless; all of which the defendant then well knew.

"And the plaintiff says that in October, 1880, the defendant delivered him 1000 shares of said stock, instead of six hundred shares, as he had agreed, but wholly neglected and refused to give the plaintiff an agreement in writing, setting forth the terms

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upon which the plaintiff held said stock, though often requested so to do. And plaintiff says that said stock was worthless, and no security; and that he was misled and defrauded by the defendant; that he has tendered back said 1000 shares of stock to the defendant, and demanded a return of his said $3000 and interest, but the defendant wholly neglects and refuses to return the same."

Fifth count. "And the plaintiff says that about the twenty-fifth day of April, 1881, at Boston, the defendant having done all the acts, matters, and things mentioned in the fourth count, and made the representations therein set forth, and being then indebted to the plaintiff in the sum of $3000 and interest, obtained solely in consequence of said representations, took the plaintiff to a certain parcel of real estate in the Dorchester district, and then and there falsely represented to the plaintiff that he was the owner of said parcel of real estate; that he had made arrangements to dispose of part of it, at a large profit, which would enable him to repay the plaintiff said $3000 and interest; that a payment was due on said land in a few days which must be made before he could carry out the trade and get the money to repay the plaintiff; and then and there proposed to the plaintiff that the plaintiff should take 1000 shares of stock in said Dennett Dental Naboli Company, and raise $2000 for the defendant to make said payment, so the defendant could carry out the trade and repay the plaintiff.

"And the plaintiff says that, at the defendant's request, and relying on all said representations, he was thereby induced to take said 1000 shares of stock and borrow $1400 on four months' credit, with a pledge of said stock as collateral, which was all the money he could raise on said 1000 shares, and so notified the defendant. That the defendant received said $1400 from the plaintiff on or about May 2, 1881, and agreed to pay the notes at maturity, on which said sum was raised by the plaintiff for the defendant at the defendant's request; that the defendant failed to pay said notes at maturity, and the plaintiff was thereupon compelled to pay them, and did pay them, and redeemed said stock pledged as collateral; that he has tendered said stock to the defendant and demanded said $1400 and interest, but the defendant neglects and refuses to repay the same.

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"And the plaintiff says that all the representations made by the defendant were false, and were known by the defendant to be false when they were made, and that they were made solely for the purpose of defrauding the plaintiff and getting possession of the plaintiff's money; that the Dennett Dental Naboli Company was a bubble company, gotten up by the defendant without any capital, credit, property, or business; that the defendant used the stock for his own purposes to raise money for himself; that none of the proceeds came to the company; that this expedition to the Dorchester district was part of a scheme to further defraud the plaintiff and get possession of more of his money, and not with any intention of repaying the previous indebtedness; and the defendant had not made any arrangement to dispose of any part of said land with intent to repay the plaintiff, but then designed and intended to cheat and defraud the plaintiff out of such sum as he might be able to raise by a pledge of said worthless stock, holding out to him the illusive hope that, by raising more money for the defendant, he would thereby enable the defendant to repay the indebtedness theretofore contracted."

After the former decision, reported 141 Mass. 207, the case was tried in the Superior Court, before *Dewey*, J. The jury returned a verdict for the defendant on the fourth count, and for the plaintiff on the fifth count in the sum of $1866; and each party alleged exceptions, which appear in the opinion.

R. M. Morse, Jr., (*W. H. Towne* with him,) for the plaintiff.

D. E. Ware & J. G. Thorp, Jr., for the defendant.

HOLMES, J. The plaintiff's evidence tended to show that the defendant's invention was merely a mixture of ingredients, all of which had been used long before to allay the pain caused by filling teeth. But it did not stop at that point; it tended to show that the compound was worthless for the purpose for which it was intended to be used; for the testimony was, that the ingredients separately were of no use, and that the mixture was as bad or worse. To meet this last proposition, the defendant put on a number of his patients, who testified that the defendant's operations upon their teeth, using his invention, were practically painless, whereas similar operations before had been very painful.

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Plainly this was not testimony of a kind which the witnesses needed to be experts to give. The objections made to it are, that it introduces the trial of collateral issues, and that the fact may admit of being explained by other causes than the conclusion sought to be established. In some cases, at least, it would seem that the painful fillings were performed by other dentists, so that it might be argued that the evidence was only a testimony to the skilfulness of the defendant's hand. But no special objection of this sort was taken or argued, and, so far as the introduction of collateral issues goes, that objection is a purely practical one, a concession to the shortness of life. When the fact sought to be proved is very unlikely to have any other explanation than the fact in issue, and may be proved or disproved without unreasonably protracting the trial, there is no objection to going into it. If a dozen patients should testify that, when the defendant used his naboli, he filled their teeth without hurting them, and that he hurt them a good deal when he did not use it, supposing the testimony to be believed, and not to be explained by fancy and a general disposition on the part of the witnesses to think well of new nostrums, it would go far towards proving that naboli had some tendency to deaden pain. Indeed, the same thing is true in a less degree, if the painful operations were by another hand. Filling teeth, however skilfully done, is generally unpleasant. If it is found to be wholly painless when a certain compound is used, as the witnesses testified, probably the compound is at least in part the cause.

The evidence of Mrs. Thaxter as to the painlessness of Dr. Emerson's operations was admitted subject to the doctor's being called to prove that he used naboli. This was equivalent to a statement that it was not admissible unless the doctor was called. If the plaintiff had wished the evidence stricken out, or to have the jury instructed to disregard it, when the case was closed without calling the doctor, he should have asked for an instruction. The admission was proper at the time, and subject to the condition which was imposed.

It follows from what we have said, that the plaintiff's exceptions must be overruled.

At the present trial of this case, the plaintiff elected to proceed on the fourth and fifth counts. The main questions raised by the

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defendant's exceptions, and argued by his counsel, are whether there was any evidence that the fraudulent representations specially alleged in the fourth count, and referred to in the fifth, helped to induce the plaintiff to enter into the transaction set forth in the fifth count, or so much of it as consisted in the acceptance of more stock; and whether there was any actionable representation concerning the real estate, as specially alleged in the fifth count. There is no question of pleading before us.

It is not denied that there was evidence tending to show that the defendant made false representations as to the stock, &c., in May, 1880, for the purpose of inducing the plaintiff to buy some of it. We cannot say, as matter of law, that such representations may not have continued to operate on the plaintiff's mind in April, 1881, and may not have induced him to accept more stock. We cannot say so, as matter of law, even if the plaintiff had become a director and had acquired independent means of knowledge in the mean time, if in fact he continued to rely upon the defendant's statements in dealing with him. Whatever may be the presumption, as between a director of a corporation and stockholders or others to whom he owes a duty, there is no such conclusive presumption that he knows the affairs of the company as will prevent his recovering against a person who in fact has defrauded him.

The plaintiff seems to have admitted that the alleged fraud as to the stock had no influence upon the transaction referred to in the fifth count. He put in evidence that he found out about the true condition of the company in July, 1880; and testified himself that he said, just before the transaction alleged took place, that the stock was not worth anything, that the defendant said naboli had failed them, and that he, the plaintiff, was induced to make the advances by his expectations as to the land which was the subject of the representations alleged in the fifth count. Coupling these facts with the verdict for the defendant on the fourth count, it is hard to believe that the alleged representations as to the stock had any practical weight or bearing upon the verdict for the plaintiff on the fifth count. We cannot say, however, that the plaintiff's admission appears, on the bill of exceptions, to have been so distinct as to have taken away his right to argue, if so minded, that the representations

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of 1880 were an operating influence in 1881, or that the judge was wrong in telling the jury that it was for them to consider how far the evidence connected the representations in the fourth count with any effective influence. It does not appear that the plaintiff's counsel did in fact present any argument inconsistent with the plaintiff's testimony. Nor was any ruling asked on the ground that the plaintiff was concluded by his own testimony.

A more important question is raised by the evidence given in support of the allegations of the fifth count. This was to the effect that the defendant said that he wanted to show the plaintiff where his $3000 was coming from (referring to the sum mentioned in the fourth count); that he had got $25,000 in a certain tract of land which he showed the plaintiff; that the plaintiff asked if the defendant owned it, and the defendant said that he had bought it, and that there was where the plaintiff's $3000 were; that he had bought it for seven cents a foot, &c. The defendant admitted that he did not own the land at the time of this conversation with the plaintiff, although he gave a different account of what was said, so that, if the evidence had stopped there, the jury would have been warranted in finding that the defendant made false statements for the purpose of inducing the plaintiff to advance more money in the hope of getting back that which he had parted with before.

But the defendant further testified that he bought the land in question on April 26, 1881, and paid about $15,000 for it, about $6000 in money and the rest in a mortgage for $9000; and we understand that this date was not disputed, and that the purchase took place before the plaintiff made his advance on the faith of the defendant's statement.

The defendant argues that the plaintiff has suffered nothing, because the statement was made good before it was acted upon. We are not prepared to say that the fact that one party to a transaction, A., has been guilty of a material fraud, is purged of its effect if the representation is made good before it is acted upon by the other party, B. There would be much force in the argument that, if B. had known of A.'s fraud before the bargain was complete, he would not have been likely to complete it, whatever the existing state of facts. People generally break off their dealings with those whom they find trying to cheat them.

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The fact that A. has tried to cheat B. is material, it may be said, because it offers what, according to common experience, would be a strong motive for not proceeding further. See *Bales* v. *Weddle*, 14 Ind. 349. A partial analogy may be found in the case of purchases of goods with the fraudulent intention not to pay for them; the buyer gives the seller all the legal rights which he purports to give him, yet the seller may avoid the sale. *Dow* v. *Sanborn*, 3 Allen, 181. *Stewart* v. *Emerson*, 52 N. H. 301. It is true, however, that in that case the implied representation of an intent to pay for the goods without putting the seller to his legal remedies is still false at the moment when the sale is made.

But, whatever the law may be in the extreme case supposed, we think that the representations must at least be made good in the most complete and indisputable way, before the defendant can escape on that ground. We cannot say, as matter of law, that they were made good by a purchase in which, by the defendant's own statement, the greater part of the price was secured by mortgage on the land. Considering the purpose of the whole conversation, which was to induce the plaintiff to advance more money, we cannot say that there was no evidence to warrant a finding that the defendant represented the land to be his own in such a sense as to secure the plaintiff a return of past and future advances, and that his subsequent purchase did not make that representation good.

The other exceptions may be disposed of in a few words. The defendant asked the judge to instruct the jury that there was no evidence of a want of novelty in his invention; but the judge refused so to do. The jury might have found that the defendant's so-called invention was only an empirical mixture of known sedatives; that it gained no new quality from the compounding, but even neutralized in some degree the qualities of the several ingredients. If they believed this, they might have found that to mix the ingredients was an expedient obvious to any person knowing their respective effects, and was not patentable. If the patent was worthless, the stock was worthless.

The plaintiff's failure to prove that he pledged stock to secure the loan to him which he procured as the first step towards advancing money to the defendant, was not material, if he proved

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the substantive elements of his case, — the defendant's fraud, and his own advance on the faith of it. See *Cunningham* v. *Kimball*, 7 Mass. 65; *Packard* v. *Pratt*, 115 Mass. 405.

The court put the plaintiff to an election between the fourth and fifth counts and the other counts. Supposing that the defendant was entitled to require that the election when made should be final, which it would not be unless made to appear of record by striking out the other counts, *Dows* v. *Swett*, 127 Mass. 364, *Mullaly* v. *Austin*, 97 Mass. 30, the refusal of the court to order the other counts stricken out is no ground for a new trial. It did not affect the trial, it can be remedied now, and, in the event which has happened, it is immaterial to the defendant whether it is remedied or not. *Exceptions overruled.*

JOHN SHEPARD & others *vs.* GEORGE F. RICHARDSON & others.

Suffolk. March 11, 14. — July 5, 1887. FIELD, C. ALLEN, & GARDNER, JJ., absent.

A corporation, having large tracts of unimproved lands, for the purpose of borrowing money to discharge existing liens upon the lands and to make them available for sale, issued bonds, the interest on which was payable semiannually, and, as security for the payment of principal and interest, conveyed its lands to trustees on the following trusts: 1. To permit the corporation to remain in possession, improve and sell the lands, until default should be made in the payment of the bonds, or the interest thereon. 2. To release from time to time from the lien created by the conveyance such portions as, in the opinion of the trustees and of the president of the corporation, might be safely released without impairing the security for the payment of the bonds. 3. To receive and invest the moneys received from the proceeds of sales of said lands, and to pay therefrom interest due on the bonds and the expenses of the trust, and to apply the residue to the purchase and cancellation of the bonds. The deed further provided that, in case default should be made in the payment of the bonds or of the interest thereof, and for six months thereafter, all the bonds should become payable; that the trustees then might, and upon the request of a certain number of the holders of the bonds should, enter and take possession of the granted premises, and should thereafter, as attorneys and agents of the corporation, "so long as said default shall continue," so manage and dispose of the same as to carry out the purposes of the trust, either by sales of the lands in their then existing condition, or by improving the same and thereafter selling them, with the largest discretion as to quantity, time, notice, and mode of sale, as they

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might deem reasonable and "for the best interests of all parties concerned in the trust;" and that the trustees, after applying any surplus proceeds of sales to the payment of the bonds, "shall restore the residue thereof, and all lands, securities, and other property remaining in their possession after such payment is completed," to the corporation, "and thereupon this trust shall terminate." The corporation covenanted that, in case of default continuing for six months, it would, on the request of the trustees, deliver up possession of the granted premises, and make any further conveyance required; and it was "further mutually agreed that, upon payment of the principal and interest of said bonds, the conveyance herein made, and the estate and interests hereby granted" to the trustees, "shall be void," and the right to the lands conveyed should revert to the corporation. *Held*, on a bill in equity by the bondholders, that the provisions of the deed were inconsistent with a right on the part of the trustees to treat the instrument merely as a mortgage, and to foreclose by entry and lapse of time.

HOLMES, J. This is a bill in equity, brought by some of the bondholders secured by an indenture, which was before the court in *Foster* v. *Boston*, 133 Mass. 143,* against the grantor and

* The indenture, which was entered into by the Boston Water Power Company, a corporation, as party of the first part, and certain persons, as parties of the second part, recited that the corporation, being possessed of large tracts of unimproved lands, for the purpose of borrowing money to discharge existing liens upon the lands and to make them available for sale, proposed to issue bonds, the interest on which was to be payable semiannually, and, as security for the payment of principal and interest, conveyed its lands to the parties of the second part on the following trusts:

"1st. To permit said party of the first part to remain in the possession and enjoyment of the granted premises, and to improve the same by filling said land and flats, and by laying out streets and avenues thereon, and otherwise making the same available for sale, and to sell and convey the same, and to dispose of the current net revenues and avails thereof in such manner as it shall elect, until and unless default shall be made in the payment of said bonds, or the interest thereon, or any part thereof.

"2d. To release from time to time from the lien created by this instrument, so that the same may be sold and conveyed free from incumbrance, such portions of said lands as in the unanimous opinion of said trustees, and of the president of said Boston Water Power Company for the time being, may be safely released without impairing the security for the payment of said bonds, either by reason of the receipt of the proceeds of sales by said trustees, or by reason of the increased value of the lands of said corporation by reason of the advance in value, or by reason of the increased value given to the remaining lands by the improvements made thereon by said corporation. And the deed of the said corporation, and the release of the said trustees, both duly executed, shall be conclusive evidence of the unanimous opinion of said trustees and of said president. And in case said trustees and said president shall not agree, then, upon the application of either, the question

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trustees, treating the instrument as a mortgage, and praying that it may be declared to have been foreclosed by an entry of the trustees made more than three years before the filing of the bill, and that the trustees may be ordered to distribute the property among the bondholders; or, if the mortgage is not foreclosed, that a short day of foreclosure may be fixed. The defendant company, among other things, denies that the indenture contemplates or permits a strict foreclosure, and, as we are of opinion with it upon this point, it will not be necessary to discuss the other questions which have been raised.

We readily admit that neither the giving of a power of sale nor the intervention of trustees, nor both together, in a mortgage, necessarily take from the court the power to decree a

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of the lands so to be released shall be submitted to and determined by the Treasurer of the Commonwealth of Massachusetts for the time being, whose written decision shall be final, and shall direct the action of the trustees thereon.

"3d. To receive and invest all sums of money that may be paid them by said party of the first part from the proceeds of sales of said land, and to pay therefrom from time to time all interest due or that may become due on said bonds, and the expenses of the trust created by this instrument, including the reasonable compensation of the trustees; and to apply the residue to the purchase and cancellation of the bonds secured by this instrument; said purchase to be made at the market value of said bonds, but in no case at a price exceeding the par value thereof and accrued interest.

"4th. In case default shall be made in the payment of the bonds issued under this instrument, or any of them, or of any of the interest coupons attached thereto, at any time when and where the same may become due and payable according to the tenor and effect thereof, and for six months thereafter, then and in that case all of said bonds shall thereupon immediately become due and payable, and the said trustees, and the survivor or survivors of them, and their successors or successor in said trust, and the survivor or survivors of them, may, and upon the written request of the holders of at least one third part of the bonds then outstanding and unpaid shall, enter upon and take possession of all and singular the granted premises, or so much thereof as shall then remain unsold, and all rights of the party of the first part therein, and all obligations and securities which may have been received for any lands conveyed by this instrument that may have been sold, and as the attorneys in fact or agents of the party of the first part, shall thereafter, and so long as said default shall continue, so manage and dispose of the same as shall best enable them to carry out and fulfil the purposes of their trust, either by sale or sales thereof in its then existing condition, or by completing the filling of said lands and flats, or of such portions thereof as they shall deem expedient, and otherwise improving the same, and thereafter selling

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strict foreclosure; *Shaw* v. *Norfolk County Railroad*, 5 Gray, 162; *Hall* v. *Sullivan Railroad*, 21 Law Reporter, 138; *S. C.* 2 Redf. Am. Ry. Cas. 621; and that the security will be presumed to give the usual remedies, unless the terms of the instrument exclude them. *Balfe* v. *Lord*, 2 Dr. & W. 480, 489. But those remedies may be excluded or qualified by express words, or by fair implication, as when it appears that sale alone is contemplated. *Locking* v. *Parker*, L. R. 8 Ch. 30, 39. *Jenkin* v. *Row*, 5 De G. & Sm. 107. *Schweitzer* v. *Mayhew*, 31 Beav. 37. There is no danger that mortgagees will be oppressed by mortgagors, and there is no reason for courts undertaking to force rights upon them, or to do more than to construe the security which they have been content to accept.

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the same by public or private sale, upon such notice, in such parcels, at such prices, and upon such terms of payment and security, at such time or times, and in such manner, as they shall deem just and reasonable, and for the best interests of all parties concerned in the trust hereby created, with full power to give good and sufficient deeds of conveyance in fee simple for any lands so sold; and after paying all expenses connected with and incident to the management and care of said property, including the compensation of the trustees, and the cost of any improvements that may have been made thereon by them or their agents, shall apply any remaining surplus of the proceeds of any sale or sales made by them, and all other moneys that may have come into their hands as such trustees, or so much thereof as may be needed, to the payment *pro rata* of the principal and interest of all of said bonds then remaining unpaid, and shall restore the residue thereof, and all lands, securities, and other property remaining in their possession after such payment is completed, to the party of the first part; and thereupon this trust shall terminate. And it is further declared that no purchaser under any or either of the foregoing trusts shall be under any obligation to inquire into the necessity or regularity of any sale thereunder, nor see to the application of any of the purchase moneys thereof, but that the receipt of the trustees or trustee for the time being to such purchaser or purchasers for such purchase moneys shall be his or their full and effectual acquittance and discharge therefor."

The corporation covenanted that, in case of default continued for six months, it would, upon the written request of the parties of the second part, deliver up to said trustees possession of the premises and all securities held by the corporation for lands sold; and that it would, upon like written request, execute and deliver any further necessary conveyance.

The indenture also recited that "it is further mutually agreed that, upon payment of the principal and interest of said bonds, the conveyance herein made, and the estate and interests hereby granted to said party of the second part, shall be void," and that the right to the lands conveyed should revert to the corporation.

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Properly speaking, the right to foreclose means the right to cut off a right to redeem given by equity, when, by the condition of the mortgage, the mortgagee's estate has become absolute at law. *Sampson* v. *Pattison*, 1 Hare, 533, 536. *Koch* v. *Briggs*, 14 Cal. 256, 262. When by the letter of the deed the mortgagor still has the right to redeem, the mortgagee cannot maintain a bill to foreclose. *Bonham* v. *Newcomb*, 1 Vern. 232; 2 Vent. 364. If, as in Welsh mortgages, the mortgagee's estate never becomes absolute, there never can be a foreclosure. *Yates* v. *Hambly*, 2 Atk. 360. Adams Eq. 125, 126. And although the failure expressly to fix a limit to the time for redemption does not necessarily take away the usual remedies, *Balfe* v. *Lord*, *ubi supra;* yet in some cases, where no time was fixed by the deed beyond which the mortgagor could not defeat the mortgagee's estate by payment, the foundation for foreclosure has been thought to be wanting. *Teulon* v. *Curtis*, Younge, 610.

The indenture before us fixes no limit to the mortgagor's right to redeem while the land remains unsold. It is not a carelessly drawn or imperfect instrument, as in *Balfe* v. *Lord*, and the fact, therefore, is important. The language is, "It is further mutually agreed that, upon payment of the principal and interest of said bonds, the conveyance herein made, and the estate and interests hereby granted to the party of the second part, shall be void," &c.; not, upon payment of the principal and interest of the bonds "according to their tenor," as in 5 Gray, 164. The words used, taken by themselves, import a right to avoid the conveyance by payment at any time, and this interpretation is confirmed by the provision in the fourth article of the trusts for the trustees managing the property, "so long as said default shall continue." These words contemplate the trustees' management as lasting for whatever time may be necessary, however long, until the bonds are paid; not that it shall come to an end in three years, by mere lapse of time, if the default continues for that time.

This is the first step; and the whole of the fourth article just mentioned tends the same way. The trust is very like the trusts for sale in the English cases which we have cited, where a foreclosure was held to be excluded. In the next place, the trustees upon entry are to manage and dispose of the property

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as agents of the party of the first part, that is, of the company giving the security. This provision, again, of itself, hardly can be made consistent with an entry to foreclose by lapse of time; for such an entry, as well as the entry provided for in common mortgages, is adverse to the mortgagor. The next thing to be noticed is the peculiar character of the trustees' duties after they have entered, — a peculiarity which was made necessary by the peculiar nature of the property. This was a great tract of land in Boston, mostly covered by water, which was to be filled and made suitable for building purposes and for the extension of the city in that direction. If the trustees entered, the scheme was not to be defeated, but simply the management was to be changed. They were to go on and fill as the company had been doing, and to sell, with the largest discretion as to quantity, time, notice, and mode of sale, as they might deem reasonable and "for the best interests of all parties concerned in the trust."

It is true that the trustees were not bound to complete the filling, and that their power possibly extended to selling the whole property at once; and it may be asked how, when such a power as that was given, any implication can be found against the less stringent power to foreclose by lapse of time. But it will be seen, upon reading the fourth article, that their powers to sell are not the common mortgage powers, but stand alongside of, and upon the same footing with, their power to complete the filling, as one of the ways in which, as attorneys and agents of the grantor, so long as the default shall continue, they are to manage and dispose of the property for the best interests of all parties. The exercise of a common power of sale may be determined upon without regard to the interest of the mortgagor. A mortgagee's decision to sell or to foreclose is governed by his own interest alone, although, in the conduct of it when decided upon, the mortgagor's interest must be considered also. See *Kirkwood* v. *Thompson*, 2 Hem. & M. 392, 400.

The effect of the words "so long as said default shall continue" has been considered already. Finally, it is provided that the trustees, after applying surplus proceeds of sales, &c. to payment of the bonds, "shall restore the residue thereof, and all lands, securities, and other properties remaining in their possession after such payment is completed, to the party of the first

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part, and thereupon this trust shall terminate." So that the whole plan, from beginning to end, was the possible gradual satisfaction of the debt, as the new-made land should be gradually sold off for building lots; and the plan was to remain the same, whether the company or the trustees carried it out. See *Foster* v. *Boston*, *ubi supra*.

Without saying that any one of the considerations which we have mentioned would be conclusive if it stood alone, we are of opinion that the whole tenor of the deed is inconsistent with a right on the part of the trustees to foreclose by entry and lapse of time. *Bill dismissed.*

S. Bartlett & R. D. Smith, (*N. Matthews, Jr.*, with them,) for the plaintiffs.

J. Lowell & H. D. Hyde, for the Boston Water Power Co.

G. F. Richardson, (*H. G. Nichols & G. D. Braman* with him,) for the trustees.

WINIFRED DALAY *vs.* HENRY W. SAVAGE.

Suffolk. Nov. 9, 1886. — Sept. 6, 1887. GARDNER, J., absent.

Land abutting on a public street in a city was sold under a power contained in a mortgage, and the owner of the equity of redemption released any title he might have to the purchaser, and was allowed by the purchaser to remain in possession under an agreement that he should pay rent at a certain rate monthly. At the time of the sale there was an open and visible defect in the cover of a coal-hole in the sidewalk in front of a house on the land, which hole led to the cellar of the house. In consequence of this defect, during the tenancy, a person walking on the sidewalk fell into the hole. *Held*, that he could maintain an action against the purchaser of the land for the injury thereby sustained.

TORT for personal injuries sustained by the plaintiff, on December 17, 1883, by falling into a coal-hole in the sidewalk in front of a house on Wall Street, in Boston. Trial in the Superior Court, before *Mason*, J., who allowed a bill of exceptions, in substance as follows:

There was evidence tending to show that the plaintiff, while in the exercise of due care, fell into the coal-hole in question. It was admitted that Wall Street then was, and for many years had been, a public street of the city of Boston; that said

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premises were conveyed to the defendant on November 3, 1883, by virtue of a power of sale contained in a mortgage of said premises, for the purpose of foreclosing said mortgage; that said premises had been conveyed, subject to said mortgage, to Daniel Breslin, on April 20, 1875, and he occupied the same from that date till after this accident; that he quitclaimed said premises to the defendant on November 9, 1883; and that the defendant was the owner of the premises at the time of the accident.

Breslin testified that he remained at a rent of $41.67 per month; that the defendant was to give him $25; that the defendant permitted him to remain and pay the rent because the defendant had not paid the $25. It appeared in evidence that Breslin remained in occupancy of said premises, under said oral agreement, from November 3, 1883, till some months after the injuries complained of.

One Durnan, a witness for the plaintiff, testified that, after assisting the plaintiff to her home, a few rods distant, he went back and examined the coal-hole, and that there was no chain on the cover, only a three-strand rope about three quarters of an inch thick; that the bed on which the cover lay had filled up with snow and dirt; and that it was liable to slip from the way it was fastened. He also testified, on cross-examination, that the bed-piece, or stone surrounding the coal-hole on which the plate or cover rested, was well worn, chipped off, and broken at the edges; and that it appeared to him this had been so a long time, so that, whether tied or untied from the inside, the cover, on being stepped on, would tip up. It also appeared in evidence that the bed had not changed in this respect during the tenancy.

The evidence tended to show that, on the day immediately following the injury, the coal-hole was repaired by some one other than the tenant, by cutting away the broken edges of the bed-piece and setting the cover deeper in the stone.

On the whole evidence, the judge ruled that the action could not be maintained; and ordered the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

P. O'Loughlin, for the plaintiff.

T. S. Dame, for the defendant.

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FIELD, J. The defendant received a conveyance of the premises on November 3, 1883, having purchased them at a sale under a power contained in a mortgage. Breslin, on April 20, 1875, had become the owner of the equity of redemption, subject to this mortgage, and he occupied the premises from this date until after the accident, which, it was admitted at the argument, occurred on December 17, 1883.

On November 9, 1883, Breslin quitclaimed whatever title he had in the premises to the defendant, for which the defendant agreed to pay him $25, and Breslin remained in occupation, as the tenant at will of the defendant, under an agreement to pay rent at the rate of $41.67 a month. There was evidence from which the jury might have found that the stone surrounding the cover of the coal-hole was permanently defective at the time the defendant became owner; that it continued in this defective condition until after the accident, and was of such a character that "the cover, on being stepped on, would tip up," whether it was tied or not on the inside; and that the accident happened, not through the negligent manner in which Breslin used the premises, but through the defective condition of the stone surrounding the cover of the coal-hole.

The defendant as landlord was under no obligation to Breslin to keep the coal-hole in repair, and Breslin was under no obligation to the defendant to repair it. It does not appear in the exceptions that the defendant at any time knew that the coal-hole was in a defective and dangerous condition.

It seems to be settled, that, if a landlord lets premises abutting upon a way, which are from their condition or construction dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered thereupon, although the premises are occupied by a tenant, unless the tenant has agreed with his landlord to put the premises in proper repair. That the tenant may also be liable is not a defence for the landlord.

The case which perhaps most nearly resembles this is *Gandy* v. *Jubber*, 5 B. & S. 78; *S. C.*, in the Exchequer Chamber, 5 B. & S. 485. The reasons why the Court of Exchequer Chamber recommended that the plaintiffs, who had recovered judgment in the Queen's Bench, should consent that the proceedings be stayed, do not appear in the report; but in 9 B. & S. 15, there

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is what purports to be the undelivered judgment of that court in the case. One question was whether a landlord who has the power to determine a tenancy from year to year by giving notice, and who does not exercise it, is to be held as thereby reletting the premises. In the course of the argument in the Exchequer Chamber, Chief Justice Erle said of the landlord's liability, "If he lets the premises with a nuisance, all parties agree that he is responsible." In the opinion published in 9 B. & S. 15, the grounds on which the Court of Exchequer Chamber differed from that of the Queen's Bench distinctly appear as follows: "We agree that to bring liability home to the owner, the premises being let, the nuisance must be one which was in its very essence and nature a nuisance at the time of letting, and not something which was capable of being thereafter rendered a nuisance by the tenant, and that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises, at the date of the demise; but that wherein we differ is that a landlord from year to year having the power of giving the ordinary notice to quit and not giving it is thereby to be held as reletting the premises, and that such forbearing to give notice is equivalent to a reletting."

The reason of the rule, that if a landlord lets premises in a condition which is dangerous to the public, or with a nuisance upon them, he is liable to strangers for injuries suffered therefrom, is that by the letting he has authorized the continuance of the nuisance.

Pretty v. *Bickmore*, L. R. 8 C. P. 401, was decided on the ground that the tenant had covenanted to keep the premises in repair, and therefore the landlord could not be said to have given authority that the premises should be kept in a dangerous state. *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658, follows *Pretty* v. *Bickmore*. See also *Leonard* v. *Storer*, 115 Mass. 86.

In *Nelson* v. *Liverpool Brewery Co.* 2 C. P. D. 311, it is expressly said that, if the landlord lets premises in a ruinous condition, he is liable to strangers.

In *Saltonstall* v. *Banker*, 8 Gray, 195, 197, the decisions in *Rich* v. *Basterfield*, 4 C. B. 783, and in *The King* v. *Pedly*, 1 A. & E. 822, are approved, and it is said that, if the nuisance

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existed at the time of the demise, the landlord is liable. See also *Todd* v. *Flight*, 9 C. B. (N. S.) 377.

In *Jackman* v. *Arlington Mills*, 137 Mass. 277, the landlord was held liable for the acts of his tenants in polluting the water of a brook by discharging into it the sink-water from the houses let, and the reason given was, that the houses let were intended to be used by the tenants in the manner in which they were used, and that, if the landlord did not retain the control of the water used by the tenants, he had by the letting authorized the use which the tenants made of the water. See also *Owings* v. *Jones*, 9 Md. 108; *Peoria* v. *Simpson*, 110 Ill. 294, 300; *Irvine* v. *Wood*, 51 N. Y. 224; *Durant* v. *Palmer*, 5 Dutch. 544.

An attempt has been made to bring the present case within the rule, that if the nuisance is created by a tenant, or by a former owner who has let the premises to a tenant, a grantee is not liable for any injury that may result from the condition of the premises while the occupation of the tenant continues. If the defendant had bought the premises subject to a lease to Breslin, who had continued in occupation under it, a different case would have been presented. But when the defendant purchased the premises, and a deed was delivered to him by the mortgagee, pursuant to the power of sale contained in the mortgage, he became the owner, and Breslin had no longer the right of occupation. The defendant could then have immediately taken possession. After this the defendant voluntarily let the premises to Breslin as a tenant at will, and, at the time of the accident, Breslin held possession by agreement with the defendant. It is strictly a case where the defendant let premises with a nuisance upon them, and took no agreement from the tenant to abate the nuisance, or to repair the premises. So far as appears, the plaintiff was lawfully travelling upon the highway, and if the coal-hole was in a permanently dangerous condition, and this condition existed when the defendant let the premises, the landlord is not excused from liability by the fact that the premises were in the occupation of a tenant at the time when the plaintiff was injured.

It is not necessary to determine whether the owner or occupant in his relations to the public is bound at all events to keep the covering of a coal-hole in a public street safe, or is only

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bound to use reasonable care. There was evidence that the defect in the covering of the coal-hole had existed for a long time, and was open and visible, and such that the person whose duty it was to repair it ought to have known its condition.

In the opinion of a majority of the court, the exceptions must be sustained. *Exceptions sustained.*

WILLIAM C. COTTON, executor, *vs.* ATLAS NATIONAL BANK & another.

Suffolk. Jan. 24. — Sept. 7, 1887. C. ALLEN & HOLMES, JJ., absent.

If A. transfers shares of stock owned by him to a bank, as collateral security for the promissory note of B., and, on the note becoming due, a new note is given by B. to the bank in renewal, the parties to the note not intending that the debt represented by the original note shall be thereby paid or discharged, the bank is entitled to hold the shares of stock as security for the payment of the new note, even though the renewal is made after the death of A.

A., at the request of B., transferred shares of stock to a bank as collateral security, knowing that the bank was to lend money to C., and leaving the details of the transaction to B., who was her son and her general agent. B. procured his promissory note to be discounted at the bank, and the money thus obtained was given to C. The note stated that the shares of stock were held as collateral security. New notes were given from time to time in renewal of the old note, and one of these stated that the shares were held as collateral security for any liability of B. due or to become due to the bank, and that might be afterwards contracted. This was done inadvertently, and without any intention to pledge the shares for any liability other than that for which they were originally pledged. After the death of A., B. being indebted to the bank on one of the notes given in renewal and on another note for which certain shares of stock were pledged as collateral security, and both notes being then overdue, B. gave a new note for the amount due on both of the overdue notes, and this note stated that certain shares of stock were pledged as collateral security for its payment. These shares were the same as those before pledged as security for both notes. Partial payments were made on the new note from dividends and sales of the shares pledged by A. *Held*, on a bill in equity by the executor of A.'s will against the bank, that the defendant was entitled to hold the shares of stock for the original debt contracted by B., after deducting the payments that had been made.

BILL IN EQUITY, filed January 1, 1886, by one of two executors of the will of Arria Cotton, against the Atlas National Bank and Frank B. Cotton, co-executor of said will, to compel the

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defendant bank to account for and pay over to Frank B. Cotton and the plaintiff, as co-executors of said will, all moneys received by the bank from the sale of certain stocks and from dividends thereon, and from checks drawn by Frank B. Cotton as executor of said will upon the funds of the estate of Arria Cotton deposited with said bank, and to transfer to Frank B. Cotton and the plaintiff, as co-executors of said will, the stocks pledged by her to secure the note of Frank B. Cotton; and to restrain the bank and Frank B. Cotton from transferring and paying over said moneys and stocks to any person except Frank B. Cotton and the plaintiff jointly, as co-executors of said will, and from meddling with the same or exercising any power or authority over the same; and for further relief. Hearing before *W. Allen*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

E. R. Hoar & G. W. Estabrook, for the plaintiff.

A. L. Soule & G. M. Stearns, for the defendant bank.

W. ALLEN, J. This case was heard by a single justice, and reserved for the full court. After the evidence was printed, the defendant moved, before the justice who heard and reserved the case, that the reservation be discharged and the case reopened for the purpose of taking further testimony. The court, after hearing, discharged the reservation, and, after hearing further evidence, reserved the case upon the bill, answer, replication, and evidence, including all the evidence taken at both hearings, subject to the objection of the plaintiff.

The question thus presented of the authority of a single justice to discharge a reservation and hear further evidence is rendered immaterial by the agreement at the argument before the full court, that, if the court should be of opinion that the additional evidence was such that it should be received by the full court, or that the reservation should be discharged and the case sent back for further hearing, the court might consider all the evidence reported as if included in the first reservation. As we think that the reservation should be discharged for the purpose of receiving the evidence, we have considered the whole evidence reported as before us under the agreement, and have no occasion to consider whether the authority to discharge the reservation is exclusively in the full court.

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On December 27, 1877, Mrs. Arria Cotton transferred certain shares of stock to the Atlas Bank as collateral security for the promissory note of Frank B. Cotton to the bank for $50,000. Mrs. Cotton died on March 17, 1880, and William C. Cotton, the plaintiff, and said Frank B. Cotton were her executors. The note was on four months' time, and, when it became due, it was renewed, by discounting a new note on the same time, and the renewals were continued as each note became due, the interest being paid at each renewal, until September 27, 1881. The note of that date was not taken up at maturity, but was kept along until January 29, 1883, during which period payments were made upon it from dividends and sales of some of the stocks. At that time the bank held another overdue note of said Frank B. for $19,000, and a new note was given by him to the bank for the amount due upon both notes. The plaintiff, as the executor of Mrs. Cotton, contends that these transactions constitute payment of the debt for which her stock was pledged; and that, if the debt was not extinguished, the conduct of the pledgee, the defendant bank, was such as to release the security.

Mrs. Cotton was not a party to the original debt, and the question whether it has been paid or discharged, or satisfied by the giving and acceptance of a new note, must depend upon the acts of the parties to it. This court has held that taking a negotiable note for a preëxisting account or note is *prima facie* a discharge of the old debt, and a substitution for it of the new note. It is a question of intention, and the intention to discharge the old note is presumed when a different intention is not shown by evidence or inferred from circumstances. When it appears that it will be for the benefit of the creditor that the old debt should be kept alive, the presumption does not arise, and the debt is not discharged. Accepting a negotiable note for a secured debt will not discharge the debt, because it will not be presumed that the creditor intended to give up his security. *Pomroy* v. *Rice*, 16 Pick. 22. *Appleton* v. *Parker*, 15 Gray, 173. *Dodge* v. *Emerson*, 131 Mass. 467. *Green* v. *Russell*, 132 Mass. 536. And the rule is the same even though the new note includes a new debt. *Taft* v. *Boyd*, 13 Allen, 84. *Hill* v. *Beebe*, 3 Kern. 556. *Brinckerhoff* v. *Lansing*, 4 Johns. Ch. 65.

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In the case at bar, the evidence shows plainly that the parties to the original debt did not intend that anything that they did should be a payment or discharge of it. The debts and the notes were as distinct in their minds as they were in reality. It was not intended or expected that the debt should be paid when the first note should mature, but that the note should be renewed and the debt kept along, the bank at all times holding for it a note not overdue. This was in fact done until the maker failed to renew the note, and allowed it to be dishonored. As soon as practicable after that, the bank procured the renewal of the note in connection with the other dishonored note of the maker. The bank clearly intended to retain its hold upon its securities, and it took the new note, not in payment or satisfaction of the debt, but only in renewal of the overdue note. It is unnecessary to consider in detail the evidence of this; no other inference can be drawn from it.

The consideration of the other question requires a more particular reference to the evidence. The plaintiff contends that Mrs. Cotton, as the general owner of the pledged stock, stood to the defendant bank in the relation of a surety upon the note; that any conduct of the bank in regard to the note which would discharge a surety upon it would release the security pledged by her; and that the renewals of the note, — which, while they did not discharge the debt, gave time to the debtor, — the change in the terms of the memorandum of the pledge written on the renewed notes, and the mingling of the debt and security with another debt and other security when the "consolidated" note was given, operated to release the security. Before considering these in detail, it is necessary to look at the relation of Mrs. Cotton to the debt, and the authority given by her in regard to the security. Mrs. Cotton was a woman of large wealth, principally invested in business corporations in her neighborhood. Frank B. Cotton was her son, and her general agent, acting under her direction, advising and representing her in many business matters. William P. Hunt was the president of the defendant bank when the first note was given. He was also the president and treasurer of, and largely interested in, the South Boston Iron Company. Frank B. Cotton was interested in that company, and in other concerns with Hunt, and had close personal and

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business relations with him. Mrs. Cotton had lent money to Hunt at different times for which there was due to her about $70,000, which was secured, and for which Hunt personally was considered amply responsible. Hunt wanted to borrow $50,000, and Frank B. applied to his mother to lend stock as collateral security for it at the bank, representing to her that Hunt wanted the money to use in his business, to enlarge it and make it more prosperous. Other considerations were mentioned, as that the business had been very prosperous, that it was likely to become much more so by taking certain contracts and extending its business, and that Hunt might have an opportunity to secure an interest in it at a low rate for Mrs. Cotton, and the fact that Hunt already owed Mrs. Cotton $70,000, secured by collateral, some of which was the stock of the South Boston Iron Company. These and other considerations were urged by the defendant as showing that Mrs. Cotton, and not Frank B., was the real debtor who borrowed the money of the bank on the note of Frank B.

But we do not find it necessary to decide that question. In the view which we take of the evidence, the material fact on this point is that Mrs. Cotton furnished the stocks on the representation and expectation that they were to be used as security for money to be lent by the bank for Hunt to use in his business. She left the details of the transaction to be arranged by Frank B. He told her that he was to give his note to the bank, but it does not appear that she knew when it was to be payable. If it is to be inferred that she understood that it was to be a short-time note, to be discounted by the bank, it is also to be inferred that she understood that the loan was to be kept along by renewed discounts. Waiving the question which was the principal debtor as between her and Frank B., as between her and the bank she lent the stocks to Frank B. to use as security for a loan for an indefinite time from the bank to him upon his note, in such form and manner as he saw fit. The right to limit the time of payment of the debt by the first note discounted, and to extend it by renewal notes to be discounted, which was given, was not a mere authority or license which determined upon the death of Mrs. Cotton; it was a right so to use the stocks, under which the arrangement with the bank was made, and the money was

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paid by it, and the liability of Frank B. upon his note was incurred. The fact that the stock was transferred directly from Mrs. Cotton to the bank did not limit the authority of Frank B. in pledging the stock; he procured and delivered to the bank the assignment from Mrs. Cotton to it, and the bank had no other communication with her in regard to it.

The original note, and the first renewal note, dated April 30, 1878, had indorsed upon them a list of the stocks, which were referred to in the body of each note as deposited "as collateral security." A subsequent note contained the words, referring to the list of stocks in the note of April 30, 1878, "as collateral security for payment of this or any other direct or indirect liability of ours to said bank, due or to become due, and that may be hereafter contracted." There was no authority to pledge the stock for other liabilities of Frank B. It does not appear that at that time there was any other liability of Frank B. to the bank, and it does appear that there was no intention to pledge the stocks for any other debt than the $50,000 for which it was already pledged. The change from the memorandum on the former notes seems to have been made inadvertently, by using a common form; no right was acquired against the plaintiff which did not exist before, and none has ever been claimed by the bank, or was intended by it. This cannot have the effect of releasing the security.

On January 29, 1883, the $50,000 note had been about a year overdue, and there was then due upon it $25,375.12, and some interest. The $19,000 note of Frank B. to the bank was more than a year overdue, and there was due upon it $18,300, and some interest. This note was secured by one hundred shares of the Manchester Mills. The whole amount of interest then due on both notes was $895.66. The amount of interest then due upon each note was then computed, and can now be ascertained by computation, but is not stated in the evidence. The bank had been endeavoring to procure a settlement of both of the overdue notes. At that time an arrangement was made; the whole amounts due upon both notes were added together, making $44,570.78. The sum of $2942.03 was paid from the estate of Mrs. Cotton, in two checks drawn by Frank B. Cotton, executor, and a new note on four months' time was given by Frank B.

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for $42,500, being the balance due, with the discount on the new note. This note was stated to be secured by certain stocks, which were in fact the same as those before pledged as security for both debts. Payments amounting to about $10,000 have been made on the consolidated note, from dividends and sales of the stocks pledged by Mrs. Cotton.

As has been before said, this transaction was not a payment of the $50,000 debt, and we do not think that its effect was to discharge the security. It did not affect the title to the stock, or give to the bank any new right to it. The bank held under the transfer to it from Mrs. Cotton, and not under the memorandum on the note. The writing on the note gave no right or title to the stock, and was not intended to give any. It was a statement in the note of a fact existing outside of it. The stock was, in fact, held as security for a debt represented in the note; and so far the statement was true. If the statement can be construed only as meaning that the stock was held as security for the full amount of the note, it was not true in fact; but how was Mrs. Cotton's estate prejudiced by the false statement? The recital did not alter the fact, or give any additional right in the stock to the bank, nor in any way affect the action of the bank in respect to it. The respective stocks stood pledged for the respective debts, as they did before, and Mrs. Cotton's stock, at least, did not become pledged for anything more. In regard to giving time upon the $50,000 debt, the effect upon that debt and its security by renewing the note as part of a larger note was the same as if it had been renewed alone. The right of action was suspended until the maturity of the new note; but upon non-payment of that, it revived as it was before, and payment of the original debt would release the security as fully as if the new note had not been given. The defendant at no time claimed to hold the stock pledged by Mrs. Cotton for anything but the debt for which it was pledged. The two notes appear to have been consolidated at the request of the bank and only for convenience, and without any intention of affecting the rights of Mrs. Cotton's estate in the stock, and nothing has occurred by which the estate has received any detriment in consequence. The amount of the debt can be ascertained, and the payments made properly applied, with as much certainty, and by the same

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computations, as if the new note had not been given. The right to redeem the stock was not impaired or hindered by the form in which the renewal of the note was made. The renewal was with the concurrence of the executors, was a waiver by the bank of its right to an immediate sale of the stock, and in that respect was apparently beneficial to the estate; and we do not think that the right of the bank was forfeited by it.

The payments upon the consolidated note have all been from the estate of Mrs. Cotton, and must be regarded as applied to the debt secured by her stock.

Most of the payments that have been made upon the debt were from the avails of the pledged stock, but several payments were made by Frank B., as executor, from the funds of the estate. It does not appear that these payments were not for the benefit of the estate. If the value of the property pledged exceeded the amount of the debt, it might be clearly for the benefit of the estate to pay the debt and release the property.

On the whole evidence, we do not see any ground upon which the bill can be maintained. *Bill dismissed.*

COMMONWEALTH *vs.* ALONZO B. WENTWORTH & others.

Norfolk. June 28. — Sept. 7, 1887. GARDNER, J., absent.

A warrant for a town meeting contained an article "to see if the town will choose the selectmen surveyors of highways," and an article "to choose all necessary town officers," naming those who were to be chosen by ballot, including selectmen, assessors, and overseers of the poor, and adding "all of said votes to be on one ballot." *Held*, that the town might vote to "choose the selectmen surveyors of highways," and "to proceed to ballot for five selectmen who shall also be assessors, overseers of the poor, and highway surveyors." *Held, also*, that ballots subsequently cast for separate boards of selectmen, assessors, overseers, and surveyors could be rejected except so far as they contained the names of persons voted for as selectmen; and that they were to be counted for such persons.

INFORMATION, in the nature of a *quo warranto*, filed March 12, 1887, by the Attorney General, at the request and upon the

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relation of certain residents, voters, and taxpayers of Dedham, alleging that the defendants were usurping the offices of selectmen, assessors, overseers of the poor, and surveyors of highways in said Dedham, which offices they assumed to hold by virtue of an election at the annual town meeting on March 7, 1887. The case was submitted to the judgment of this court upon an agreed statement of facts, the material parts of which appear in the opinion.

W. Gaston & C. L. B. Whitney, for the Commonwealth.

A. B. Wentworth, for the defendants.

DEVENS, J. The contention of the relators is, that it was not within the power of the town to vote that there should be elected only selectmen who should be, or should act, as assessors, overseers of the poor, and surveyors of highways; and further, if the town might do so under a proper warrant for the meeting, it could not do so under the warrant as framed.

There was a distinct article in the warrant "to see if the town will choose the selectmen surveyors of highways," under which the town voted to "choose the selectmen surveyors of highways." There is nothing incompatible in these offices; surveyors of highways are not required by law to be chosen by ballot; the duties of such officers may properly be performed by the selectmen; and the warrant fully brought to the attention of the town the question whether such duties should be imposed on the selectmen. We do not understand the relators to insist that this might not properly have been done, but they especially urge that it was not in the power of the town by vote to prevent the inhabitants from voting for distinct boards as assessors of taxes and overseers of the poor. Assuming for the moment the sufficiency of the warrant in this respect, it was, we think, competent for the town to determine that the selectmen should be assessors and overseers. The town officers who shall be chosen, their number, and the duties they shall perform, are left to a certain extent to the vote of the town. Before any ballot could be proceeded with, it was necessary to determine by vote how many selectmen (whether three, five, seven, or nine) should be chosen; and, if the town intended to choose distinct boards as assessors or overseers, the number who should constitute these boards was to be first determined. These preliminary questions

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were necessarily to be decided by those who were present when the meeting was organized, and ready to proceed with the business of the town. Those voters who subsequently arrived had necessarily to conform to every lawful vote thus taken as to the order or manner of the election, or the officers or number of them to be chosen. The vote of the town was "to proceed to ballot for five selectmen, who shall also be assessors, overseers of the poor, and highway surveyors," an amendment which was proposed to ballot for distinct boards being first rejected. The contention of the relators, that it was the right of such voters as so desired thereafter to vote for distinct boards, cannot be maintained. There is no statutory requirement that distinct boards of assessors and overseers shall be chosen, and the language of the vote passed followed closely the language of the statute, which provides that "the selectmen shall be assessors of taxes and overseers of the poor in towns where other persons are not specially chosen to those offices." Pub. Sts. *c.* 27, § 101.

The relators, however, contend that, if this vote could properly have been passed under a sufficient article in the warrant, the terms of the article did not authorize any such vote. While a town is limited in the transaction of business by the articles in the warrant, yet a liberal construction has always been given to their language, so as to include all that is properly, even if incidentally, embraced in the subject to which they relate. "The articles inserted in warrants for calling town meetings," says Mr. Justice Hubbard, "presenting the various subjects for the consideration of the inhabitants, are from the very nature of the case general in their description, and are oftentimes inartificial in their construction. They are the mere abstracts or heads of the propositions which are to be laid before the inhabitants for their action; and matters incidental to and connected with such propositions are alike proper for their consideration and action." *Haven* v. *Lowell*, 5 Met. 35, 40. It is not necessary that the warrant for a town meeting shall specifically state that the inhabitants will be called to act on the question of granting money for a particular purpose, in order to render a grant valid, if the subject to be acted on is distinctly stated, and is one which will be likely to require a grant of money. *Blackburn* v. *Walpole*, 9 Pick. 97. An article in a warrant to see if

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a town will appropriate money to a particular object, authorizes a vote to raise, as well as to appropriate it. *Torrey* v. *Millbury*, 21 Pick. 64.

The article in the case at bar was "to choose all necessary town officers." It then names those which are to be chosen by ballot, including selectmen, assessors, and overseers of the poor, states the length of the respective terms, and adds, "all of said votes to be on one ballot." This was sufficient to authorize the town to determine the number of officers to be chosen, and the duties to be imposed on them, so far as it might lawfully do so, and to deal with the whole subject of their election in any appropriate manner. Where a warrant for the annual town meeting, held by law for the purpose of choosing officers, contained articles "to choose all necessary town officers" and "to choose all necessary committees," and the statute allowed of two modes of choosing committees, it was held that under these articles the town was authorized to determine which mode should be pursued, and to pass a vote that each school district choose its own committee, this being one of the modes provided by statute. *Williams* v. *Lunenburg School District*, 21 Pick. 75. *Kingsbury* v. *Quincy School District*, 12 Met. 99. An article in a warrant for an annual town meeting "to elect all necessary town officers for the ensuing year," and an article "to raise and appropriate such sums of money as may be necessary to defray town charges for the coming year, and pay any indebtedness of the town," are sufficient, under the Gen. Sts. *c.* 18, § 22, to authorize the town to vote at the meeting, in conformity with the Gen. Sts. *c.* 18, § 73, to invest the collector of taxes thus duly chosen with all the powers which a town treasurer has when appointed collector of taxes. "The subject of choosing officers includes," says Chief Justice Chapman, "as an incident, any special authority that the town is authorized by statute to confer upon them in the exercise of their official duties." *Sherman* v. *Torrey*, 99 Mass. 472.

Indirectly the town could determine that the persons chosen selectmen should also be assessors and overseers, by choosing selectmen only, and leaving them to become assessors and overseers by the operation of the statute. There is no apparent reason why this might not also be done by a direct vote, which,

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in determining the number of the selectmen, also provided that they should be assessors and overseers.

The article in the warrant was sufficient, and, when we examine the facts, appears to have been fully understood by the voters of the town. Whether there should be a single board of selectmen only, or whether the other boards also should be chosen, was discussed at the caucuses held previously to the election; "an unusually large number were present" when the vote on this matter was taken at the beginning of the town meeting, and before the balloting; and there was no objection to or protest against the vote, until just before the closing of the polls.

There remains the question whether, in counting the votes, all those ballots should have been rejected which, in addition to those persons named as voted for as selectmen, contained also the names of the same, or some of the same persons, or other persons, as assessors, overseers, and surveyors. The declaration of the moderator that any ballots which contained more than five names should be rejected, could not enlarge the vote of the town, the meaning of which was, that selectmen only should be voted for, who should be *ex officio* assessors, etc. Ballots containing the names of certain persons as selectmen, and certain as assessors, etc., were irregular under this vote, but there was no difficulty in ascertaining for whom the voter intended to vote as selectmen. The same difficulty is not presented as that which would be found if a voter should vote for seven selectmen, when only five were to be elected. The ballots in the case at bar, cast by these voters for selectmen, were readily distinguishable from the other portion of the ballot; the voters had a right to give them for the selectmen, upon whom the town had imposed the duties of the other offices; and there does not appear to have been any fraudulent purpose in placing names for the other offices on the ballot, nor by so doing was any serious embarrassment occasioned. There is no difficulty in rejecting as surplusage all that portion of these ballots which relates to the boards of assessors, &c., as selectmen only were to be voted for.

It may be said that those votes for selectmen should be rejected where other names were on the ballot, because, by voting

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for different persons to constitute distinct boards of assessors, &c., the voter depositing it indicated clearly an intention not to vote for selectmen who should have the powers of the other boards of officers. But the ballot must be construed in conformity with the vote of the town. While the voter sought by such a ballot to assert his right to vote for distinct boards, it must be held, if he could not rightfully do this, that, in voting for selectmen, he had voted for them with such powers as the town had by vote conferred upon them.

It will not be necessary to consider the various classes of these ballots. It is not in dispute that, if all the votes for selectmen are counted, including those upon ballots where there are also votes for assessors, &c., the relator Murray would be elected, and not the defendant Wentworth. The result, therefore, is, that Murray was duly elected to the office of selectman, and, on taking the necessary qualifying oaths, should be admitted to exercise it in connection with the other lawfully chosen selectmen; and that there should be a judgment of ouster against Wentworth. *Strong, petitioner*, 20 Pick. 484. *Conlin* v. *Aldrich*, 98 Mass. 557. *Judgment of ouster accordingly.*

MEMORANDUM.

ON the seventh day of September, 1887, the Honorable WILLIAM SEWALL GARDNER resigned the office of justice of this court, which he had held since the thirteenth day of October, 1885.

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SYLVESTER P. PIERCE *vs.* EQUITABLE LIFE ASSURANCE SOCIETY.

Suffolk. November 17, 18, 1886. — September 17, 1887.

An insurance company, incorporated in another State, issued there to A., who was a resident of that State, a policy of insurance upon his life for a certain sum payable on his death to him, his executors, administrators, or assigns. The policy was known as a tontine policy on the savings fund insurance plan, and was to continue as such for the term of ten years, if A. should live so long. If a person insured under such a policy should die during the tontine period, his estate would receive only the amount of his policy; and if he should fail, during the tontine term, to pay the premiums on his policy, it would be forfeited. Policies of this character were kept in classes according to their tontine periods, and, while the funds of each class were not kept separate, distinct accounts were kept with each class, showing the amount due upon each policy at the expiration of the tontine term. At the expiration of such term, it was provided that "all the surplus or profits derived from such policies on the tontine savings fund insurance plan as shall cease to be in force before the completion of their respective tontine dividend periods shall be apportioned equitably among such policies as shall complete their tontine dividend periods" The holder of the policy then had the option "to withdraw in cash the policy's entire share of the assets, whether in the reserve fund proper or in the accumulated surplus," or to use this share in various modes prescribed by the policy for the procurement of additional insurance, or by the purchase of an annuity for the payment of the premiums thereafter becoming due on his policy. The "reserve fund proper" and "accumulated surplus" were made up of the dividends withheld on the premiums of the class during the tontine term, by reason of forfeiture by death or non-payment of premiums within the term. The corporation had a place of business in this Commonwealth, and an agent to receive service of process, but its books and papers were kept in the other State. A. brought a bill in equity in this Commonwealth against the corporation, after the expiration of the tontine period of his policy, for an account. The corporation put in a general appearance, and an answer to the merits, and objected to the jurisdiction of the court for the first time at a hearing on the merits. *Held*, that the defendant had waived any objection to the jurisdiction of the court; that A. was a creditor, and not a member, of the corporation; and that the bill could be maintained without joining the other policy holders of the plaintiff's class.

By the law of the State of New York, as shown by its judicial decisions, an insurance company which by a policy agrees that the surplus or profits derived from policies on the tontine savings fund assurance plan that shall cease to be in force before the completion of their tontine dividend periods shall be apportioned equitably among such policies as shall complete their tontine dividend periods, does not hold such surplus or profits as a trust.

BILL IN EQUITY, filed October 18, 1884, by the holder of a policy of life insurance issued by the defendant corporation,

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alleging that by the terms of the policy the defendant had constituted itself his trustee for his share of all accumulations of a certain fund, and praying for an account. Hearing before *Holmes*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

E. P. Usher, for the plaintiff.

J. Lowell & R. M. Morse, Jr., for the defendant.

DEVENS, J. The policy of life insurance in regard to which the plaintiff seeks that the defendant shall render an account, complaining that the defendant has not apportioned to him the share of reserve and profits to which he is entitled, was made in New York; and the plaintiff is, and was at the time of bringing this bill, a resident of that State, under the laws of which the defendant is incorporated. Had the defendant, instead of appearing generally, objected originally that, even if an account should be taken, it ought not to be held to answer here to the plaintiff, in view of these facts and the great inconvenience involved in taking such an account at a distance from the State in which its voluminous books and papers are properly kept, such objection would have been worthy of serious consideration. Even if the plaintiff is entitled to an account, he might, under such circumstances, be compelled to seek it where it can most appropriately, as well as most conveniently, be rendered. The objection which the defendant makes to the jurisdiction of the court appears to have been taken for the first time when the case came on to be heard on its merits before a single justice. In the opinion of a majority of the court, any objection to the exercise of the jurisdiction of this court founded on the facts above set forth must be deemed to have been waived by the general appearance, pleading to the merits, and the delay in taking the objection.

The principal characteristics of the policy on which the controversy arises are these. It was for the sum of $10,000, payable, on the decease of the plaintiff, to him, his executors, administrators, or assigns, and was for the term of his life. It was known as a tontine policy on the savings insurance plan, and was to continue as such for the term of ten years, if the plaintiff should live so long. If the holder of the policy died during the tontine period, which expired on March 18, 1883, his estate would not receive

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any benefit from the dividends which ordinarily are made on life assurance policies annually or at stated periods, which dividends consist of the surplus of premiums after deducting the cost of insurance and the computed reserve, these being then held by the company for the benefit of the other policy holders, and forfeited by him. His estate would receive only the amount of his policy. If the holder of the policy also should fail during this tontine term to keep up his policy by payment of the premiums, it would be forfeited. Policies of this character are kept in classes of ten, fifteen, or twenty years, according to their tontine periods, and, while the funds of each class are not kept separate, distinct accounts are kept with each class, so as to show the amount to which it is entitled, and by this means the amount due upon each policy at the expiration of its tontine term. At the expiration of ten years, if such be the term, or at the completion of the tontine dividend period, it is provided that "all surplus or profits derived from such policies on the tontine savings fund assurance plan as shall cease to be in force before the completion of their respective tontine dividend periods shall be apportioned equitably among such policies as shall complete their tontine dividend periods." On March 18, 1883, the policy not having terminated, the plaintiff had the option "first to withdraw in cash this policy's entire share of the assets, whether in the reserve fund proper or in the accumulated surplus; secondly, to convert the same into a paid-up policy for an equivalent amount; . . . . or, thirdly, to continue the assurance for the original amount, and apply the entire tontine dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this policy."

The "reserve fund proper" and "accumulated surplus" are made up of the dividends which have been withheld on the premiums of the class during ten years, the dividends thus withheld from those who have died within the ten years being forfeited for the benefit of the class to which their policy belonged, and also all payments made by and dividends withheld from those who have forfeited their policies by non-payment of premiums.

It is the contention of the defendant that the plaintiff is bound by the apportionment made by its officers in the discharge

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of their duties, unless it shall be shown at least that they did not act in the exercise of an honest discretion and in good faith. We find no words in the policy indicating that the decision of the defendant is to be conclusive; and the words by which the defendant agrees "equitably" to apportion to the plaintiff's policy its share of the profits bind the defendant to make the apportionment, and imply that, in any proper proceeding, it may be inquired whether it has fulfilled this part of its contract.

That the bill brought by the plaintiff cannot be maintained on the ground that he is the beneficiary of a trust fund held by the defendant, which is one of the grounds upon which an account is often ordered, and upon which theory the bill is based, is, we think, reasonably clear. By the New York law, which must govern the construction of a contract made between New York parties to be performed in that State, it has been found as a fact by the judge who presided that the policy issued to the plaintiff did not create a trust. This finding is fully sustained by the evidence from the decisions of the tribunals of that State. *Taylor* v. *Charter Oak Ins. Co.* 9 Daly, 489. *Hencken* v. *United States Ins. Co.* 11 Daly, 282; *S. C.* 98 N. Y. 627. *Verplanck* v. *Mercantile Ins. Co.* 1 Edw. Ch. 84. *People* v. *Security Ins. Co.* 78 N. Y. 114. *Bewley* v. *Equitable Assurance Society*, 61 How. Pr. 344. *Cohen* v. *New York Ins. Co.* 50 N. Y. 610. *St. John* v. *American Ins. Co.* 3 Kern. 31. *Uhlmann* v. *New York Ins. Co.* 13 Daly, 47. While the prayers in the plaintiff's bill have been made upon the theory that there was a trust fund held by the defendant for the benefit of the plaintiff, with others, as a holder of a ten years' tontine policy, no objection is pressed by reason of the form of the bill. We proceed to consider, therefore, whether, upon any other ground than that strictly of trust, the bill may be maintained for an account.

Our statute gives jurisdiction in equity upon accounts "when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law." Pub. Sts. *c.* 151, § 2, *cl.* 10. Even if the amounts kept back from the plaintiff and those of his class of policy holders, by the retention of those dividends which would otherwise have been received,

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or of those sums accruing from the forfeiture of policies either in whole or in part, do not constitute a trust fund, or place the defendant in a strictly fiduciary capacity, the defendant was bound to keep accurate accounts of them, and of all interest and profit thereon, if any. All the facts were entirely within its own knowledge, and it is only thus that it can be determined what equitably should be apportioned to the plaintiff.

It is said that the plaintiff has a sufficient remedy at common law; that he can bring his action at law; and that, upon proper interrogatories addressed to the defendant, all the information necessary for the proper adjustment of the account may be obtained. But even if an action at law could be maintained, where an account is complicated so that a full examination and settlement of previous accounts, transactions, or methods of business are necessary, and where the whole matter is entirely within the knowledge of the defendant, it cannot so conveniently or accurately be investigated at common law as in equity. Even if a trial by jury be claimed and allowed, the court might, in a suit in equity, so mould the issues and direct the course of the trial as to avoid many of the difficulties attending a trial at common law. *Hallett* v. *Cumston*, 110 Mass. 32. It was thus held, in the case cited, that one who was not a partner, but was entitled to share in the net profits of a business, might maintain a bill for an account against a partnership which necessarily involved an examination of its transactions, and of its whole course and methods of conducting business. In *Massachusetts General Hospital* v. *State Assurance Co.* 4 Gray, 227, it was said that the plaintiff might properly maintain a bill for an account of the net profits arising from the insurance of lives made by it, one third of which the defendant was by law bound to pay the plaintiff.

That the accounts are singularly complicated, and that the method by which the value of the share of the plaintiff which he has obtained by full payment of his premiums and completion of his tontine period is ascertained is one of much complexity and difficulty in its application, appear from the evidence reported. A court of equity is the appropriate tribunal for dealing with such an account, and the defendant is fairly bound to produce an account from the data in its

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possession which shall show that it has complied with its promise equitably to apportion to the plaintiff his share in the accumulations made through the operation of the tontine provisions in his policy.

Nor do we perceive that it is necessary to join any more of this class of policy holders in the bill, or that the bill should be brought on their behalf. It appears by the answer of the defendant, and also by the evidence, that all the policy holders of the class to which the plaintiff belonged have been settled with, and that they have received the amount apportioned to them by the defendant corporation. But even if it did not so appear, the plaintiff made his individual contract with the defendant; if others have similar contracts depending on similar states of fact, they in no way affect his contract; he has no demand upon any one other than the defendant; and nothing that he will receive from the defendant will in any way affect the claims of others.

It is contended that the apportionment of the reserve or accumulated profits to be made at the conclusion of the tontine dividend period is but the declaration of a dividend; that the court will not interfere with the declaration of a dividend, even by a domestic corporation, it being a question solely for its directors, or other proper officers, whether any dividend shall be made, and if so, of what amount; and that, until this is made, no stockholder has any rights in any profits that have been made, or assets that might be divided. Conceding this to be the general law, the amount to be apportioned, or which the plaintiff is entitled to have apportioned, is not a dividend, in the limited sense in which the word is used in its application to dividends to stockholders. Between stockholders and the corporation of which they are members no relation of debtor or creditor ordinarily exists, nor does any arise until a dividend has been declared. The affairs of the corporation are managed by those whom the stockholders elect as officers, and by this administration of affairs they are bound. The plaintiff is not a member of the corporation, but its creditor, who has contracted with it. At the end of a fixed period, having complied with the contract on his own behalf and made the payments required, he is entitled to have apportioned to him his share of a certain

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fund, to be computed. The defendant has no right to withhold it, as a corporation may withhold profits from a stockholder. This share, or its equivalent in value, is the plaintiff's own property, and not that of the defendant corporation.

Nor is it important that the sum to be computed as belonging to the class, and from which the apportionment to the plaintiff's policy is to be made, is constituted partially of dividends which but for the tontine contract would have been previously paid upon the policy. It may be that the amount of the dividends annually, or at other stated intervals, distributed to policy holders could be absolutely determined by the officers of the corporation. If this is so, the plaintiff would still have a right to an account, and to ascertain whether the dividends reserved under his contract were proportionally the same as those declared on other life insurance policies, having relation to their different circumstances; or at least to ascertain what were the amounts reserved as dividends to be passed to the credit of the fund when it should be computed, if it had no actual existence. In our view of the case, if the defendant were a domestic corporation, there would be a right on the part of the plaintiff to have an account taken, and to ascertain thereby whether a fair apportionment had been made. If the defendant had kept no account, if it had no means of furnishing one, or showing whether it had dealt justly or unjustly with the plaintiff, it should be answerable for the injury which it had occasioned by its neglect to do what the contract implies it would do.

The defendant is, however, a foreign corporation; and it is urged that this court ought not to take jurisdiction of the case, if it were possible so to do, and that practically it is impossible for it to effect justice between the parties.

That it is a matter of grave inconvenience to the defendant to be held to account here, may be conceded. That, if the objection had been promptly taken that the plaintiff was a resident of New York as well as the defendant, it would have received serious consideration, we have heretofore suggested. *Smith* v. *Mutual Ins. Co.* 14 Allen, 336. But we find no inconvenience that is insuperable; the defendant has an established place of business in this Commonwealth, and an agent to receive service of lawful process. It may be presumed that it anticipates that the profits

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of the business will compensate for the inconvenience of being held to answer, and in a proper case to account, in a State other than that to which it owes its corporate existence. It is true that we cannot bring the officers, or the books, or the assets, of this corporation within our jurisdiction, but the corporation is itself lawfully before us. We shall not assume that it will neglect any order that we may pass, nor indicate how such order may be enforced, or, if it cannot be enforced, how such proceedings may be had that the plaintiff may be indemnified for the violation of the contract made with him.

It is further objected that the case requires us to exercise a jurisdiction over the corporation in its corporate functions, in the matter of its internal economy, and in the relations existing between it and its policy holders. The statute under which this corporation is subjected to the service of process does not, it is true, necessarily bring the subject matter of the suit, or the remedy sought, within the jurisdiction of this court; nor do the rights and liabilities of parties under local laws necessarily follow them into other jurisdictions. *Smith* v. *Mutual Ins. Co.*, *ubi supra*. Did the inquiry before us concern the relation between the defendant corporation and its stockholders, we could not undertake to pass upon or determine it. *New Haven Horse Nail Co.* v. *Linden Spring Co.* 142 Mass. 349. Such an inquiry is to be determined by the local tribunal. Were the case such that we were called upon to pass any order directing or controlling the corporation in the exercise of its corporate duties, we have no such jurisdiction as would enable us to do it. The subject matter would not be within our province.

But, in the case at bar, the plaintiff is a creditor, and not a member, of the corporation. He has a contract with it which he contends the corporation has not fairly performed. There is no question of its internal economy involved, as where the relations between its members and the corporation are concerned. If it has adopted any method of conducting its business inconsistent with the due performance of its contract, such a method of administration will not deprive the plaintiff of any rights. It can no more refuse to account than could an individual to whom the plaintiff entrusted his moneys on any similar contract. In dealing with the plaintiff the corporation dealt with

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an outside person, and only the relation which it bears to such person, claiming to be its creditor, is here involved.

The question whether, if the defendant is to account, on what principles it shall do so, or whether, if the case is submitted to a master, it shall be so submitted by an order which shall direct him how the account shall be taken, have not been discussed, and are not considered. It may be that fuller evidence may be required than has yet been taken before they can be disposed of. *Decree for an account.*

MICHAEL C. BRASLIN *vs.* SOMERVILLE HORSE RAILROAD COMPANY.

Middlesex. January 17. — September 19, 1887.

A street railway corporation was made liable by its charter for any injury that any person might sustain by reason of any carelessness, negligence, or misconduct of its agents and servants, in the management, construction, or use of its tracks. Subsequently, the corporation leased to another street railway corporation a certain portion of its track for the unexpired term of its charter, subject to all duties and liabilities imposed upon the lessor by its charter, and the lessee covenanted to assume and perform them, and to defend any suits brought against the lessor arising out of the operation and use of the road, and to pay any judgment recovered against the lessor. The lessee further agreed to deliver the property to the lessor at the end of the term, and there was a provision for reentry for breach of covenant. The lease was afterwards ratified by an act of the Legislature. After this, a passenger on a car of the lessee while on the leased road was injured by the negligence of a servant of the lessee. *Held*, that an action could be maintained against the lessor for such injury.

TORT for personal injuries. At the trial in the Superior Court, before *Blodgett*, J., it appeared that the defendant owned a horse railroad on Elm Street, in Somerville, which connected with the horse railroad of the Cambridge Railroad Company; that on November 30, 1882, the same was used and operated by the Union Railway Company under certain leases and contracts; and that on said day the plaintiff was a passenger upon a car of the Union Railway Company, and received the injuries complained of by being thrown from the car upon Elm Street.

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There was evidence tending to show that the injuries complained of were occasioned by the negligence of a servant of the Union Railway Company, who was then driving the car in which the plaintiff was a passenger.

The leases and contract under which the railroad was run at the time of the accident were put in evidence, and appear in the opinion.

The judge ruled that the plaintiff could not maintain his action, directed a verdict for the defendant, and reported the case for the determination of this court. If the ruling was right, judgment was to be entered on the verdict; otherwise, the case was to stand for trial.

G. A. Bruce, (*M. F. Farrell* with him,) for the plaintiff.

Samuel Hoar, (*W. H. Martin* with him,) for the defendant.

C. ALLEN, J. The question presented by the report is, whether the plaintiff's right of action, if any, is against the defendant, or exclusively against the Union Railway Company, another street railway company, which was operating the defendant's road under the assignment of a lease. The presiding justice in the Superior Court ruled that the plaintiff could not maintain his action against the present defendant, and reported the case for the determination of this court, upon facts which were not in dispute. Those facts, so far as material, are as follows:

The Middlesex Railroad Company was incorporated by the St. of 1854, *c.* 434, with power to construct a street railway; and by § 5 was made liable "for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the management, construction, or use of said tracks, roads, or bridges." The Somerville Horse Railroad Company, the defendant in this action, was incorporated by the St. of 1857, *c.* 250, to receive a transfer of the franchise and property of the Middlesex Railroad Company in the town of Somerville; and, upon such transfer being made, the Somerville Horse Railroad Company was to stand in the place of the Middlesex Railroad Company, so far as the road in Somerville was concerned; and the duties, liabilities, and burdens imposed on the Middlesex Railroad Company were transferred from said company and imposed upon the Somerville

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Horse Railroad Company. This transfer appears to have been carried into effect; and the defendant was in possession accordingly.

In April, 1871, a tripartite agreement was entered into between these two companies and the Union Railway Company, whereby, among other things, the Somerville Horse Railroad Company agreed to lay a new street railway track on Milk Street and Elm Street in Somerville, and, on the completion thereof, to lease the same to the Middlesex Railroad Company; and on January 5, 1876, in order to carry into effect the above agreement, a lease thereof was executed accordingly, for and during the unexpired term of the lessor's charter, "upon the like terms and conditions, and with all the rights and privileges, contained in a certain written instrument, bearing date the 1st day of June, A. D. 1869, and duly executed by the said Middlesex Railroad Company and the said Union Railway Company." This lease did not include the whole of the railroad of the lessor, and no mention was made therein of the lessor's franchise.

Referring now to the instrument of June 1, 1869, in order to ascertain the terms and conditions of the above lease, it appears that it was a lease from the Middlesex Railroad Company to the Union Railway Company of a certain piece of street railroad in Somerville, theretofore built by the Somerville Horse Railroad Company, and by it leased to the Middlesex Railroad Company; and the lease of June 1, 1869, was made "subject, however, to all the conditions, restrictions, duties, and liabilities imposed upon the said Somerville Horse Railroad Company by its charter, and its contracts and agreements." The lessee was to pay a certain rent and all taxes; and it agreed to "assume and perform all duties imposed upon the Somerville Horse Railroad Company, by its charter, save those incident to its organization and continuance," and further to "keep said railroad in good repair during said term, and to run and operate the same in such proper and careful manner as the public safety and convenience may require, and that it, the party of the second part [i. e. the lessee], at its own cost will defend any and all suits of any kind brought against said Somerville Horse Railroad Company and the party of the first part, severally, on account of injuries to person or property, and any loss of property happening, or which

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may arise out of the operation and use of said railroad during said term, and any acts and neglects of said party of the second part and any persons in its employ, and will pay and discharge all judgments recorded against them or either of them in such suits." The lessee further agreed to deliver to the lessor, at the expiration of the term, the said property; and there were provisions for re-entry for breach of covenant.

The lease of January 5, 1876, from the Somerville Horse Railroad Company to the Middlesex Railroad Company, was assigned by the lessee to the Union Railway Company, on February 1, 1876, subject to all the liabilities, duties, and conditions contained in said lease; and the assignee covenanted to do and perform all the duties and services, and assume all the risks and liabilities, and perform all the covenants and agreements, imposed by said lease upon the lessee named therein.

At the time when the plaintiff received the injuries complained of, the railroad, at the place of the accident, was used and operated by the Union Railway Company under the above-mentioned lease and assignment, which, by the St. of 1876, *c.* 53, were ratified, confirmed, and declared valid; and all acts and proceedings theretofore done under and in accordance therewith were declared valid and legal.

The question presented for determination is, whether, by means of the above-mentioned instruments and statutes, the Somerville Horse Railroad Company is exonerated from responsibility to a person injured upon that part of its railroad which it leased to the Middlesex Railroad Company on January 5, 1876. There is perhaps no reason to doubt that the Union Railway Company would be responsible; but we are to determine whether the Somerville Company is also responsible.

The general rule is familiar, that neither a steam nor a street railway corporation can make a valid transfer, either by way of absolute deed, mortgage, or lease, of its franchise, or of its railroad and the bulk of its property, or relieve itself of the burdens imposed upon it by law, or by its charter, without the consent of the State. *Commonwealth* v. *Smith*, 10 Allen, 448. *Richardson* v. *Sibley*, 11 Allen, 65. *Central National Bank* v. *Worcester Horse Railroad*, 18 Allen, 105. *Middlesex Railroad* v. *Boston & Chelsea Railroad*, 115 Mass. 347. *Davis* v. *Old Colony Railroad*,

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131 Mass. 258, 271. *Railroad* v. *Brown*, 17 Wall. 445, 450. *Bower* v. *Burlington & Southwestern Railroad*, 42 Iowa, 546.

In *Quested* v. *Newburyport Horse Railroad*, 127 Mass. 204, a street railway company had leased its railroad and franchise, under legislative authority to do so, it being expressly provided by statute, however, that such lease should not exempt said company from any duties or liabilities to which it would otherwise be subject. There is no similar express provision in any statute affecting the present case, but on the other hand, we find nothing indicating an intent that the defendant, by means of a lease, should be able to escape from its liabilities and responsibilities to the public.

The provisions of the lease, including those which are incorporated by reference, define the duties and obligations of the contracting parties as between themselves, and appear to be sufficient effectually to bind the lessee to indemnify the lessor against loss. But it is nowhere stated that the lessor should be exonerated from responsibility, nor was it possible for the parties to make a contract which should have that effect. The sanction of the Legislature was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. The lease did not purport to transfer the lessor's franchise, or the whole of its property. The lessor was not going out of business entirely, but only leased a portion of its road, with provisions for restoration of the leased property at the end of the term, and for re-entry. It was under a positive duty and obligation to the public, and the consent of the Legislature to the making of the lease did not imply a discharge from the duty and obligation. Indeed, there is a certain implication that the parties did not contemplate any such discharge, arising from the stipulation for indemnity "during said term," that is, during the whole term of the lease. Where a corporation seeks to escape from the burdens imposed upon it by the Legislature, clear evidence of a legislative assent to such exoneration should be found.

We do not overlook the decisions in *Mahoney* v. *Atlantic & St. Lawrence Railroad*, 63 Maine, 68, and in *Murch* v. *Concord Railroad*, 9 Foster, 1, 35, which certainly are rather to the effect that the lessees alone are responsible, under circumstances not

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much unlike those in the present case. But we do not find that the lessee was substituted for the defendant in any such sense as to relieve the latter from liability; and the result is, that there must be a new trial. *New trial granted.*

DARIUS WELLINGTON *vs.* JOHN V. APTHORP, administrator.

Suffolk. January 20. — September 19, 1887.

In an action against the administrator with the will annexed of the estate of A., on an alleged agreement by A. to bequeath to the plaintiff $5000, an auditor, to whom the case was referred, found that the plaintiff was the brother-in-law of A., an unmarried woman, and lived in the same house with her, and advised with her as to her investments; that she said if she made a profit on one investment managed by the plaintiff she would give him one half, and on this she made a profit of $10,000; that, soon after, she told the plaintiff that if he would go on and act as her adviser she would make a will giving the plaintiff's wife a legacy of $5000, and if his wife died before the plaintiff she would, by a new will, leave this sum to him; that such a will was made; that, afterwards, the plaintiff assisted A. in making many profitable investments; that subsequently, when the plaintiff's wife was fatally ill, A. said to the plaintiff, that, if he would accompany her on a visit to California, she in consideration thereof, and in consideration of the services he had rendered and might thereafter render to her, would make a will leaving him $5000; that the plaintiff assented, and the will was made, the old will being destroyed; that the plaintiff accompanied A. on the journey proposed, and in all respects complied with the agreement; and that, subsequently, A. made a new will which revoked the former will and left nothing to the plaintiff. *Held*, that, these facts not being controverted, the judge who tried the case without a jury was not warranted in finding that the facts did not show that A. entered into a binding agreement with the plaintiff, or in finding that the agreement declared on was not proved as alleged; and that he should have found that the plaintiff was entitled to maintain the action.

CONTRACT against the administrator with the will annexed of the estate of Mary Chism, deceased, upon an agreement alleged to have been made by her with the plaintiff, on or about May 23, 1878, to bequeath to him by her last will the sum of $5000, and pay his expenses of a journey to California and Nevada in accompanying her there in the fall of 1878; and also upon an account annexed for services in managing her property, in accompanying her to California and Nevada, and for cash paid by him as expenses on said visit.

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The case was referred to an auditor, who made the following report:

"The defendant is administrator with the will annexed of Mary Chism, deceased. Prior to 1853, Mary Chism, with two sisters, Charlotte and Octavia, kept a boarding-house in Boston. The plaintiff had boarded with them, and in 1853 he married Charlotte Chism. After their marriage the plaintiff and his wife continued to board with Mary Chism during the greater part of the time until the death of said Charlotte.

"About 1862, the two sisters, Mary and Octavia, had acquired by inheritance and their savings about $4000, which sum, by advice of the plaintiff, was withdrawn from savings banks and invested in United States bonds.

"Octavia Chism died in August, 1863, and her share in said bonds came into the possession of Mary Chism. In July, 1866, by advice of the plaintiff, Mary Chism invested the proceeds of said United States bonds in the equity of real estate on Rowe Street, afterwards Chauncy Street.

"While Mary Chism was owner of the equity of the Chauncy Street estate, and when there was a prospect of making a profit upon it of about $10,000, she told the plaintiff that if such profit was made by him he should have one half, or a part of it.

"In April, 1868, the equity of the Chauncy Street estate was sold at a profit of $10,000; this sale was negotiated and advised by the plaintiff. Shortly after this sale had been made, Mary Chism told the plaintiff, if he would go on and act as her agent and adviser respecting her investments, she would make a will, giving the plaintiff's wife a legacy of $5000; and, in the event of the plaintiff's wife dying before the plaintiff, she would then by a new will or codicil bequeath the legacy of $5000 to the plaintiff. The plaintiff assented to said arrangement, and, a day or two after this conversation, Mary Chism executed a will containing a legacy of $5000 to Charlotte, wife of the plaintiff.

"After the execution of said will, and while it was unrevoked, in June, 1868, Mary Chism purchased an equity in real estate in Washington Street, and sold it at a profit in January, 1869. In January, 1869, the plaintiff intended to purchase on his own account the equity of an estate in Bedford Street, and applied to

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Mary Chism to borrow $2000, to be used in such investment; she expressed the wish to join in the transaction, and the plaintiff assented. They agreed that she should advance all the money, and, after receiving seven per cent interest thereon, the profits should be equally divided. She did furnish the money, and the title was taken, and mortgage given, in her name. After paying her the seven per cent interest, the profits of this investment were between $4000 and $5000, and were equally divided. The estate was sold, part in 1873, and the balance in 1874. In 1876 she purchased the equity of an estate in Mt. Vernon Street, which she retained at her death. All the above-mentioned purchases and sales of real estate were negotiated and advised by the plaintiff, and made solely upon his judgment.

"In June, 1878, the plaintiff's wife, Charlotte, died. A few weeks before her death, and when it was apparent that she was fatally ill, Mary Chism, with the knowledge of said Charlotte told the plaintiff that she desired to visit California, and a brother who resided in Nevada, and that, if the plaintiff would accompany her there in the fall of that year, she, in consideration of his so accompanying her, and of the services he had rendered, and might thereafter render her, respecting the management of her property, would make a will giving him $5000, and pay his expenses of the journey. The plaintiff assented thereto; and, thereupon, in May or June, 1878, Mary Chism destroyed the will before mentioned, and executed a new one, wherein she gave the plaintiff a legacy of $5000. At this time Mary Chism's property was about $23,000, and it had been acquired largely by the advice and management of the plaintiff; and I find that the plaintiff's advice was valuable and his management judicious, and were given and rendered whenever requested or required, and he has received no compensation therefor, except as stated respecting the Bedford Street property.

"In the fall of 1878, and the winter following, the plaintiff accompanied Mary Chism to Nevada and California, and then and thereafter in all respects complied with and fulfilled the aforesaid agreement. And I find that the items of cash paid by him for expenses of the journey, alleged in the account annexed to the declaration, and amounting to $473.24, were incurred by him, and are reasonable, and should be allowed.

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"Mary Chism died, October 18, 1883, without issue and unmarried, leaving a will, revoking all former wills, dated December 20, 1880, which was admitted to probate on November 12, 1883, and contains no legacy to the plaintiff.

"Whether or not, upon the facts stated in this report, the plaintiff is entitled to recover any greater sum than said $473.24, is reserved for the ruling of the court."

At the trial in the Superior Court, before *Bacon*, J., the plaintiff put in evidence the report of the auditor, and rested.

The defendant thereupon called the plaintiff, who testified that he was married again in November, 1879; that he did not inform Mary Chism, beforehand, of his intended marriage; that there was no occasion of his doing so; that he did inform her thereof, by a messenger, on the day of the marriage; and that she was not present at the ceremony; nor was any one else, except the necessary parties.

There was no other evidence in the case; and, upon the evidence, the judge found for the plaintiff in the sum of $473.24, with interest from the date of the writ, for the expenses of the plaintiff on his journey to California and Nevada. To this finding the defendant alleged exceptions.

The judge further found, that the facts stated in the auditor's report did not sufficiently show that a binding agreement was entered into by Mary Chism with the plaintiff to make a will in his favor; and that the agreement declared upon, whereby she was to bequeath to him by her last will the sum of $5000, was not proved, as alleged; and upon these issues found for the defendant. The judge also found for the defendant upon the items of the account annexed for services rendered in the management of said Mary Chism's property, and in accompanying her on a visit to California and Nevada. To these findings the plaintiff alleged exceptions.

The judge reported the case for the determination of this court.

J. S. Patton, for the plaintiff.

A. M. Howe, (*T. J. Homer* with him,) for the defendant.

C. ALLEN, J. It is not contended, on behalf of the defendant, that a contract, founded on a sufficient consideration, to make a certain provision by will for a particular person is invalid in law. The contrary is well settled. *Jenkins* v. *Stetson*,

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9 Allen, 128, 132. *Parker* v. *Coburn*, 10 Allen, 82. *Canada* v. *Canada*, 6 Cush. 15. *Parsell* v. *Stryker*, 41 N. Y. 480. *Thompson* v. *Stevens*, 71 Penn. St. 161. *Updike* v. *Ten Broeck*, 3 Vroom, 105. *Caviness* v. *Rushton*, 101 Ind. 500.

Nor is it contended that a contract to leave a certain amount of money by will to a particular person, though oral, is open to objection under the statute of frauds. It is not a contract for the sale of lands or of goods; and it may be performed within a year. *Peters* v. *Westborough*, 19 Pick. 364. *Fenton* v. *Emblers*, 3 Burr. 1278. *Ridley* v. *Ridley*, 34 Beav. 478. *Kent* v. *Kent*, 62 N. Y. 560. *Bell* v. *Hewitt*, 24 Ind. 280. *Wallace* v. *Long*, 105 Ind. 522. Such a contract differs essentially from a contract to devise all one's property, real and personal, which comes within the statute of frauds. *Gould* v. *Mansfield*, 103 Mass. 408.

The obligation of such a contract is not impaired, though the consideration is to arise wholly or in part in the future, and though the person to whom the promise is made is under no mutual binding obligation on his part.

In *Train* v. *Gold*, 5 Pick. 380, 385, it was said by Mr. Justice Wilde, that, "if A. promises to B. to pay him a sum of money if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B., at the time of the promise, does not engage to do the act." This doctrine was quoted with approval in *Gardner* v. *Webber*, 17 Pick. 407, 413, and in *Bornstein* v. *Lane*, 104 Mass. 214, 216; and it is also affirmed in *Goward* v. *Waters*, 98 Mass. 596.

In *Cottage Street Church* v. *Kendall*, 121 Mass. 528, 530, it was held that, "where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing, upon the faith of the promise, the promise, which was before but a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of an offer of reward." See also *Paige* v. *Parker*, 8 Gray, 211, 213; *Hubbard* v. *Coolidge*, 1 Met. 84; *Todd* v. *Weber*, 95 N. Y. 181, 192; *Miller* v. *McKenzie*, 95 N. Y. 575, 579.

It is therefore in law competent for a valid oral contract to be made to leave a certain sum of money by will to a particular person, in consideration of services thereafter to be rendered by

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the promisee to the promisor, provided such services are in fact thereafter rendered and accepted in pursuance of such contract, although the promisee did not bind himself in advance to render them. The performance of the consideration renders the contract binding, and gives a right of action upon it.

The objection mostly relied on by the defendant in the present case is, that the auditor's report does not conclusively show such a contract, upon such a consideration. The auditor does not in terms, as he might properly have done, make any specific finding upon the question whether there was such a contract; but he states the facts in detail, upon which he considered that question to rest, and leaves the determination of it to the court. The detailed facts stated by the auditor are not controverted, and the evidence upon which they were found is not before us. These facts are therefore to be taken as they stand, with no further explanation than is afforded by the circumstances. Looking at them in this manner, it is to be determined whether on the whole there is enough clearly and decisively to show that there was a contract, so that the judge who heard the case could not properly find the contrary; in other words, whether it appears that there was a promise by the defendant's testatrix sufficiently definite to be enforced, and made with the understanding and intention that she would be legally bound thereby. A promise made with an understood intention that it is not to be legally binding, but only expressive of a present intention, is not a contract. *Thruston* v. *Thornton*, 1 Cush. 89. Chit. Con. (11th Am. ed.) 12, 13.

Ordinarily, when there is a distinct promise, for a sufficient consideration, to do a particular thing, such promise is to be considered as a contract, unless there is something in the subject of the promise, or in the circumstances, to repel that assumption. But each case must be examined in the light of its own circumstances.

In the present case, it appears that the plaintiff was the brother-in-law of the defendant's testatrix, who was an unmarried woman; that he was early in the habit of advising with her about her business affairs, and not at the outset, if ever, in the expectation of being paid directly for his services. Nevertheless there soon came to be a recognition on her part that the plaintiff's services

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were valuable in a money sense, and an intention to pay him for them in some form. By his advice, in 1866, she bought real estate in Chauncy Street, and sold it again in 1868 at a profit of $10,000, the sale being advised and negotiated by him. Prior to the sale, she told him that, if such profit should be made, he should have one half, or a part of it. In fact, nothing was paid to him at this time, but it appears that she already contemplated putting the relation between them on a business basis; and shortly afterwards she told him, that, if he would go on and act as her agent and adviser respecting her investments, she would make a will giving his wife $5000; and, in the event of his wife's dying before him, that she would then by a new will or codicil bequeath the legacy of $5000 to him. He assented to this, and she made her will accordingly, bequeathing $5000 to his wife. All this savored of a business arrangement. The sum mentioned was not greater than she had talked of paying to him as a part of the profits on the sale of the Chauncy Street real estate; indeed, not so great, for that was to be payable in 1868, while the bequest would not be payable till after her death.

In 1868, another purchase was made of real estate, which was sold at a profit in 1869. In 1869, he admitted her to share in a purchase of real estate in Bedford Street, which he had intended to make on his own account; the whole of the money was furnished by her; and in 1873 and 1874 the estate was sold at a profit of between $4000 and $5000 over and above the allowance to her of seven per cent interest on the purchase money, and this profit was equally divided between them. In 1876, a purchase was made of real estate on Mt. Vernon Street. All of these purchases and sales were negotiated and advised by the plaintiff, and were made solely upon his judgment.

Such were the relations of the parties up to 1878. She had paid him nothing for his services; but her will, bequeathing $5000 to his wife, had stood during all this time, according to the understanding between them in 1868. Nothing had been said or done to vary the effect of her promise to bequeath the legacy of $5000 to him, in the event of his wife's dying before him.

In 1878, a new arrangement was made. The plaintiff's wife was fatally ill, and died in June of that year. A few weeks before her death, and when it had become apparent that she was

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fatally ill, the defendant's testatrix told the plaintiff that she desired to visit California, and a brother who resided in Nevada, and, if he would accompany her there in the fall of that year, she, in consideration of his so accompanying her, and of the services he had rendered and might thereafter render her respecting the management of her property, would make a will giving him $5000, and pay the expenses of the journey. The plaintiff assented thereto; and in May or June of that year she destroyed the will then existing, and executed a new one, wherein she gave to him a legacy of $5000. According to the terms of what she had proposed in 1868, she was by a new will or codicil to bequeath to him the legacy of $5000, in the event which was now at hand, if he would go on and act as her agent and adviser respecting her investments. This he had done up to that time. She now proposed to him that she would make a will giving him $5000 in consideration of his accompanying her to California and Nevada, and of the services he had rendered and might thereafter render to her. There was no stipulation binding him to render such services for any particular length of time in the future. The most that could fairly be implied is, that he should render them as requested, and as long as he should be able to do so. Her proposition appears to have been intended as in the nature of business. The relations between the parties in the past had not been merely those of kindness and voluntary aid. The services which he had already rendered were substantial, and of a business character. They did not consist merely of advice, but he appears to have taken, to a large extent, the responsible charge of her business matters, and to have conducted them successfully. In addition to continuing such services he was now asked to accompany her to California, which he did, in the fall of 1878, and the winter following, a trip of several months. She proceeded at once to act upon his acceptance of her proposition, and made a new will accordingly. This new will remained unrevoked for two and a half years.

In view of all these circumstances, it seems to us that, upon a just construction of the auditor's report, there is not enough to repel the ordinary assumption, that the promise of the defendant's testatrix was a contract, which, when made, was intended and understood by both parties to be binding upon her.

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The present case materially differs in its facts from *Maddison* v. *Alderson*, 8 App. Cas. 467; *S. C.* 5 Ex. D. 293, and 7 Q. B. D. 174. In that case doubt was expressed whether there was a contract, but the question was not finally determined. It depended in part upon a review of testimony, which is not fully reported. The terms of the alleged promise and consideration differed from those in the case before us in certain respects which might be found to be material. But the decision in that case turned finally upon the question whether, assuming a contract, it had been shown that there had been a part performance, sufficient to take it out of the statute of frauds; and it was held in the negative.

Upon the auditor's report, in the present case, we must now assume that the whole consideration stipulated for was performed by the plaintiff, and that it was sufficient. It is expressly found that his advice was valuable, and his management judicious, being given and rendered whenever requested or required; that he has received no compensation therefor, except as stated respecting the division of the profits arising on the sale of the Bedford Street real estate; that in the fall of 1878 and the winter following he accompanied her to Nevada and California, "and then and thereafter in all respects complied with and fulfilled the aforesaid agreement."

It is also suggested in behalf of the defendant, that, even assuming a contract, it was not proved to be a contract to make a will which should not be revoked. But looking at the language used, in the light of the circumstances existing and preceding, so narrow a construction of the contract is not permissible. The substance of it was, that she would bequeath to him the sum mentioned. An instrument effectual as a will was clearly contemplated. Otherwise, the promise was but illusory.

The result is, that, in the opinion of a majority of the court, the plaintiff was entitled to judgment for the sum of $5000 and interest, in addition to the amount found at the trial. The defendant's exceptions are overruled, and the plaintiff's exceptions are sustained. *Ordered accordingly.*

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MEMORANDUM.

On the fourteenth day of September, 1887, the Honorable MARCUS PERRIN KNOWLTON, one of the Justices of the Superior Court, was appointed a Justice of this Court, in place of Mr. Justice Gardner, resigned, and took his seat upon the bench on the twentieth day of the same month at the sitting of the court then held at Greenfield in the county of Franklin.

SAMUEL D. WARREN & another, trustees, *vs.* DANIEL CAREY.

Middlesex. March 4; September 20.—22, 1887.

In an action, the answer to which is a general denial only, for the obstruction of an ancient watercourse, caused by placing a pipe in the defendant's land while the adjoining land was owned by C., the plaintiff's grantor, evidence that C., after his deed to the plaintiff, told a third person that the pipe was an improvement on the old drain, and that he assented to the putting in of the pipe, is inadmissible, although the plaintiff holds the land in trust, and C. is one of the *cestuis que trust*; and evidence that C., when informed by the defendant that he contemplated putting in the pipe, told him to do so and he would bear part of the expense, and that he subsequently paid a part of such expense, is also inadmissible.

TORT for the obstruction of an ancient watercourse, described in the declaration as an "ancient rivulet or stream," which had existed beyond the memory of man. Answer, a general denial. Trial in the Superior Court, before *Thompson*, J., who allowed a bill of exceptions, in substance as follows:

The evidence showed that the plaintiffs held the land which was alleged to be damaged by the obstruction of the watercourse under a quitclaim deed of trust from one Henry M. Clarke, in trust for himself and others, and that they brought this action as such trustees; that said land lay west of and adjacent to land of the defendant, and that a ditch, with defined banks and bed, and of varying width, had for more than twenty years before the doing of the act complained of run across the land now owned by the plaintiffs, in an easterly direction across land of the defendant; that in 1879, while the title to said land of the plaintiffs

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was in Clarke, the defendant put a pipe through and under his land, substantially within the walls of the old ditch, which pipe took the water from the ditch on the plaintiffs' land and emptied it into the old ditch, at the easterly side of the defendant's land.

The plaintiffs contended that this pipe carried the water less freely than in the open ditch in which the pipe was laid, and obstructed the free flow of the surface water from their land; but upon this point the evidence was conflicting.

The defendant asked a witness whether Clarke ever told him that the pipe was an improvement on the old drain; but, upon the plaintiffs' objection, the judge excluded the question. The defendant then asked the witness whether Clarke had ever told him that he, Clarke, assented to the putting in of the pipe; and this question was also excluded.

The defendant then offered to show that, previously to his putting in the pipe in question, he went to see Clarke and told him what he contemplated doing, and that he thought a pipe would improve the drainage, and asked Clarke to bear part of the expense; that Clarke told him to go ahead and put in the pipe, and he would pay a fair part of the expense; that the defendant, relying upon the assent and promise of Clarke, put in the pipe, and subsequently Clarke paid a part of the expense thereof. The judge excluded this evidence.

The plaintiffs took the objection, among others, to all the above evidence and offers of evidence, that, even if otherwise competent, it was not open to the defendant under his answer.

It appeared in evidence that Clarke was on the ground, and knew of the putting in of the pipe, and made no complaint.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

The case was argued at the bar in March, 1887, and was afterwards considered on the briefs by all the justices.

H. N. Allin & G. L. Mayberry, for the defendant.

S. D. Warren, Jr., for the plaintiffs.

W. ALLEN, J. It must be taken from the terms of the exceptions, that the plaintiffs' land was injured by water set back upon it in consequence of the obstruction by the defendant upon his land of an ancient watercourse, which flowed from the

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plaintiffs' land through the defendant's land. The declaration describes the watercourse as an ancient rivulet or stream, which had existed beyond the memory of man.

The exceptions state that the action was for damages for the obstruction of an ancient watercourse, and that the evidence showed that "a ditch, with defined banks and bed, and of varying width, had for more than twenty years run across the land" of the parties. No question is suggested in the exceptions as to the nature of the plaintiffs' right, and it must be taken that it was not a mere easement derived by grant from the owner of the defendant's land, but the right to have the water flow from his land in a natural watercourse.

The obstruction complained of was the filling up of the ditch, or watercourse, except so much of it as was occupied by a pipe for conducting water. The obstruction was made when Clarke was the owner of the plaintiffs' land, and has been continued since. The plaintiffs' title is from Clarke, in trust for himself and others. The declarations and admissions of Clarke made after his deed to the plaintiffs are not made competent by the fact that he is one of several *cestuis que trust*. *Pope* v. *Devereux*, 5 Gray, 409. Besides, the acts of Clarke which they were offered to prove were not competent; and the remaining exception, which is to the rejection of evidence offered to prove such acts, cannot be sustained.

So far as such acts tend to prove a license, whether by Clarke or by the plaintiffs, they are not competent, because a license is not set up in the answer. Pub. Sts. *c.* 167, § 20. *Hollenbeck* v. *Rowley*, 8 Allen, 473. *Ward* v. *Bartlett*, 12 Allen, 419.

If the defence of a right by grant or prescription to flow the plaintiffs' land is open under an answer of general denial, the evidence offered was not competent to prove it. It is a right to an easement in the plaintiffs' land which can be shown only by grant or prescription. The evidence was not competent to prove either. *Cobb* v. *Fisher*, 121 Mass. 169. *Craig* v. *Lewis*, 110 Mass. 377. *Fitch* v. *Seymour*, 9 Met. 462. *Morse* v. *Copeland*, 2 Gray, 302. *Stevens* v. *Stevens*. 11 Met. 251.

Exceptions overruled.

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JOHN H. BRADFORD & another, trustees, *vs.* REBECCA M. BRINLEY & others.

Suffolk. March 15. — Sept. 22, 1887. KNOWLTON, J., absent.

A testator by his will gave his homestead at W., after the death of his wife, to his two sons, A. and B., in fee; the sum of $300,000 to trustees, in trust to pay the income to his wife during her life, and at her death to pay to such person as she should by her will direct $50,000 of the principal of said sum, and to pay the residue of said principal sum into the residuary fund of the estate; and gave the residue of his estate to trustees, in trust to divide the same into two equal parts for the benefit of his two sons, to subdivide each of such parts into two equal parts, to pay one of the parts, after the subdivision, to each of the sons absolutely, and to hold the other part and pay the income of the same to each son, or his wife or family, during his life, and at his death to such persons as he should by his will direct. A. died before his mother, leaving a will, by the first clause of which he gave to his wife, "except as otherwise provided in the subsequent articles" of the will, the use during life of all the property of which he should die possessed or entitled to, or which he could dispose of, and also the income of all property devised by his father's will of which he could direct the disposition, "not included in the foregoing gift to her of a life estate therein;" and in case any subsequent gift or direction in the will should fail, he gave the use or income of all the property in respect to which the gift or direction should so fail to his wife for life. The third article of A.'s will, after reciting that, whereas by his father's will certain property, including his homestead at W., was devised to be held in trust for the benefit of his mother during her life, and that one half of the same or the proceeds thereof might be disposed of by A. subject to his mother's interest therein, directed that his wife, if living at the time of his mother's death, should have the use and enjoyment of that part of said property "which is thus liable to be disposed of by me, or of the income thereof, if my power extends no further than to dispose of the income," until the eldest of his children who survived him attained his majority, at which time, if his wife was still living, his executors were directed "to set apart, out of the said property, a fund for the benefit of said child, consisting of money or securities, or partly of money and partly of securities," to the amount or value of $100,000; and when his second child who survived him attained his majority, his executors were directed "to set apart" for his benefit a "similar" fund of $100,000; and so on in succession as each child attained his majority, until a fund of $100,000 had been set apart for each of his children who should attain majority; and further provided that his wife should continue to have the use and enjoyment during life of the remainder of the property, or its income, after such funds were successively set apart; and that, at any time after his mother's death, his wife might give to any of his children, or their issue, absolutely and indefeasibly, any part of the capital mentioned in this article or in the first article, "except such portion thereof as may have been set apart to constitute any of the funds mentioned in this article, or which it is necessary to retain in order to constitute all of said funds," and that every division subsequently provided for in the will should be made without reference to such gift. By subsequent

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clauses of the will the testator indicated his intention that his children should share his property equally. A.'s children, of whom there were three, all survived him, and their mother was also living. A.'s mother died after A. The real estate in W., mentioned in the will, was conveyed by A. in fee to his mother before the date of his will. The trustees of A.'s will received from his father's estate the sum of $389,000, of which $125,000 was from the fund of $300,000. *Held*, that the reference in the third article of A.'s will to the fund for the benefit of his mother was so definite as to exclude the construction that he meant to refer to his power over his part of the entire residuary estate of his father. *Held, also*, that the legacies given by the third clause of A.'s will to his children were demonstrative, and not specific; and that a legacy of $100,000 to each of the children must be paid in full, on each child coming of age.

BILL IN EQUITY, filed February 1, 1887, by the trustees under the will of Samuel Dexter Bradford, late of Newport, in the State of Rhode Island, deceased, against Rebecca M. Brinley, formerly Rebecca M. Bradford, widow of the testator, and the three children of the testator, to obtain the instructions of the court as to the construction of the will.

The case was heard by *Holmes*, J., and reserved for the consideration of the full court, on the bill, the answers of the several defendants, and certain agreed facts; and was as follows:

Samuel D. Bradford, formerly of West Roxbury, the father of the testator, died in 1865, leaving an estate inventoried at $1,595,334. By his will, which was duly admitted to probate, he devised his homestead estate in West Roxbury to his widow for life, with remainder in fee to his two sons, Samuel Dexter Bradford and John H. Bradford. He also bequeathed the sum of $300,000 to trustees, in trust to pay the income to his widow during her natural life, giving her the power to dispose by will of $50,000 of the principal fund, and directing that at her death the residue of the fund should be paid into the "residuary fund" of his estate.

The residuary clauses of this will were as follows:

"All the rest and residue of my property and estate, of whatsoever kind and wheresoever situated, real, personal, or mixed, of which I shall die seised or possessed, or to which I shall be entitled at the time of my decease, or which may, by any means or cause whatsoever, be added to my estate, or come to my heirs or legatees through me, in my right, I give and bequeath to the trustees hereinafter appointed, to be held by them in trust for the following uses, purposes, trusts, and limitations, and no other,

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viz.: to pay such sums as they shall deem fit and proper for the support and education of my second son, John Henry Bradford, during his legal infancy, and when said son shall attain the age of twenty-one years then to divide the said property and estate mentioned in this item of my will into two equal parts or portions, in such way and manner as they shall deem just and equitable; one of such parts to be for the benefit of each of my sons, Samuel Dexter Bradford, Junior, and John Henry Bradford, and their heirs, and to be paid to them by the said trustees in the following manner, to wit, the part or portion of each of my said sons shall be divided into two equal parts, and one part or moiety be paid to him by the said trustees to be held by him, his heirs and assigns forever, and the other part or moiety shall be held by the said trustees, and the income and interest thereof, as it may accrue, be paid over to him, or his wife or family, if he have any, as the said trustees shall deem proper and expedient, during his natural life, and at his decease the last-mentioned part or moiety to be paid over to such person or persons, and under such limitations, regulations, and conditions, as he shall by his last will and testament direct and appoint, if he shall leave such an instrument; and if he shall not leave a last will and testament, then to be paid to his children if he leaves any, in equal proportions, share and share alike.

"In case either of my sons shall decease leaving no issue, and having made no testamentary disposition as aforesaid, then I direct the said trustees to transfer all the funds in their hands belonging to the deceased son to the surviving son, to be paid over to him, his wife, family, legatees, or heirs, in the same way and under the same conditions as are heretofore provided for in regard to his own share of my estate."

On January 12, 1873, Samuel Dexter Bradford, the son, died in the city of New York, leaving a will, duly executed at Newport on October 26, 1872, which was admitted to probate on February 2, 1876, in the county of Norfolk in this Commonwealth; and the plaintiffs were appointed trustees thereunder on July 14, 1886. The testator left a widow and three children, all of whom are now living and are over twenty-one years of age. His will contained the following clauses:

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"Article 1. Except as otherwise provided in the subsequent articles of this will, I give, bequeath, and devise to my wife Rebecca the use, benefit, and enjoyment, during her natural life, of all the estate and property, real, personal, or mixed, whereof I may die seised or possessed, or to which I may in any manner be entitled, either at law or in equity, of which I am authorized by my father's will, or by any instrument, to dispose, or to direct or appoint the uses, ownership, payment over, distribution, or other disposition, by my last will or otherwise; and I direct and appoint the said Rebecca to receive, have, and enjoy, for her own use and benefit, during her natural life, the income of the estate and property devised and bequeathed by my father's last will for the benefit of myself and my family, or of any other person, whereof I am authorized by my father's will or by any instrument to dispose of the income, or to direct or appoint the uses, ownership, payment over, or other disposition of such income, and which is not included in the foregoing devise and bequest to her of a life estate or life interest therein. And if, for any reason, any of the devises, bequests, appointments, or directions contained in any of the subsequent articles of this will are wholly or partly prohibited by the law governing the same, or are insufficiently made to take effect as therein intended, then I give, devise, and bequeath to the said Rebecca the use, benefit, and enjoyment, during her natural life, of all the property with respect to which such devise, bequest, appointment, or direction is thus prohibited or insufficiently made, or I appoint the income thereof to be paid to her during her life, according as my power to dispose of or with respect to the same extends.

"Article 2. I give and devise to my said wife Rebecca, to be held and enjoyed by her, her heirs and assigns forever, as her own absolute property, the dwelling-house and all the adjacent land at Newport, Rhode Island, constituting my residence and homestead, and all my interest, right, or title therein or thereto, either at law or in equity. And I give and bequeath to her, as her absolute property, all ready money on hand at the time of my decease; all debts, claims, and demands, due to me; all securities owned by me personally, as distinguished from those held in trust for me; together with all horses, with their

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harnesses and equipments, all carriages and other vehicles, all wearing apparel, watches, jewelry, and other ornaments, all paintings and other works of art, all books, all silver ware, plated ware, china, glass, carpets, linen, and household furniture of every description which I own, or am entitled to dispose of.

"Article 3. Whereas, by the terms of my father's will, certain property, real and personal, including his homestead at West Roxbury, Massachusetts, is bequeathed and devised to be held in trust or otherwise, for the benefit of my mother, during her lifetime, and one half of the same or of the proceeds thereof may be disposed of by me, subject to her interest therein or the trusts for her benefit; I do therefore order, direct, and appoint that if my said wife is living at the time of my mother's death she shall have the use, benefit, and enjoyment of that part of said property which is thus liable to be disposed of by me, or of the income thereof, if my power extends no further than to dispose of the income, till the eldest of my children who survives me attains his or her majority. When that event happens, if she is still living, my executors are hereby directed to set apart, out of the said property, a fund for the benefit of said child, consisting of money or securities, or partly of money and partly of securities, to the amount or value of one hundred thousand ($100,000) dollars. When my second child who survives me attains his or her majority, my said executors are directed to set apart for his or her benefit a similar fund of one hundred thousand dollars; and so on in succession, as each child attains his or her majority, until a fund of the amount or value of one hundred thousand dollars has been set apart for each of my children who attains majority. My said wife shall continue to have the use, benefit, and enjoyment of the remainder of the property, or of the income of such remainder as the case may be, as each successive fund is set apart, (and of the remainder, after all the funds are set apart,) during her lifetime as aforesaid. And I order, direct, and appoint that at any time after my mother's death my said wife may give to any of my children, or to any issue of such child, absolutely and indefeasibly, any part of the capital of the property mentioned in this or in the first article of this will, except such portion thereof as may

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have been set apart to constitute any of the funds mentioned in this article, or which it is necessary to retain in order to constitute all of said funds. And every division to be afterwards made, as hereinafter provided, shall be made without reference to such gift, the residue only being divided.

"Article 4. Immediately after the death of my said wife, my surviving executors are directed to divide all the estate and property mentioned in any part of this will, except that mentioned in the second article thereof, into as many shares as I shall leave children me surviving, who have also survived till their mother's death, or who have died and left issue surviving at that time. If my mother dies before my wife, any of the funds which have been set apart as provided in the third article of this will shall be accounted part of the share to which the child or the issue of the child for whom it was so set apart would be entitled at my wife's death; but it shall not again be divided as part of the estate mentioned in this article. If, on the other hand, my wife dies before my mother, the division provided for in this article shall be made without reference to the property bequeathed and devised by my father for my mother's benefit, as stated in the foregoing third article; and after my mother's death that portion of said property which is subject to my disposition, as therein stated, shall be divided into as many shares as I shall leave children me surviving, who have also survived till their grandmother's death, or who have died and left issue surviving at that time. And in order to enable them the better to make the division or divisions herein provided for, and to discharge their powers and duties under this will, I hereby bequeath and devise to said executors and the survivor or survivors of them, in trust for the purposes herein mentioned, all the property mentioned in this will, except in the second article thereof, subject to the life estates and interests of my said wife and mother respectively.

"Article 5. Every fund or share to be created or set apart as hereinbefore provided for shall be equal in value or amount, in my executors' judgment, to every other fund or share to be created or set apart at the same time. Every fund or share created or set apart for the benefit of the issue of a deceased child shall be immediately paid, delivered, or transferred to such

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issue. Every fund or share created or set apart for the benefit of a child who is then living shall be held and managed by my executors, during the lifetime of that child, in trust to invest and reinvest the same, and to pay over the clear income thereof, deducting expenses, to that child, as the same accrues, and not otherwise, the anticipation of any such income being hereby expressly prohibited. At his or her death, leaving surviving issue, such issue shall take absolutely the capital and unexpended income of such fund or share. But if such child leaves no surviving issue, he or she may dispose of the capital and unexpended income by a last will and testament, but not otherwise. In default of any such disposition, such capital and unexpended income, or the part thereof not disposed of, shall be equally divided between my other children then surviving and the surviving issue of those who may be dead. Such issue to take the share to which the parent would have been entitled if living.

"Article 6. Whenever the issue or surviving issue of any deceased child is mentioned in this will, descendants of all degrees are included; and the issue of any deceased descendant shall take by representation and in severalty the share which the parent would have taken if living.

"Article 7. If my said wife shall marry again, no property or income to which she is entitled by any portion of this will, except the second article thereof, shall be received by her husband, or liable for her debts or the debts of her husband.

"Article 8. I appoint my said wife to be the guardian of my children, and I desire that my said children make my mother's house their home during their minority, and my daughters afterwards, except in the event of their marriage. But I wish my eldest daughter, Julia Emma, to continue to live with my mother until the death of the latter."

The real estate in West Roxbury, mentioned in article 3 of the will, was conveyed by the testator in fee to his mother, Julia E. Bradford, long prior to the date of said will, and the real estate mentioned in article 2 of the will, situate at Newport, was conveyed by the testator, long prior to the date of the will, to Arthur W. Austin, in trust for the creditors of said testator and for other purposes.

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Julia E. Bradford, the mother of the testator, died on August 15, 1886, leaving a will, which was duly admitted to probate, and by which she exercised the power given her by the will of her husband, and disposed of the sum of $50,000.

The plaintiffs have received, as trustees, from the residuary estate of Samuel D. Bradford of West Roxbury, the sum of $389,101.43. This sum includes $125,000 which the trustees received from the trust fund of $300,000 created by the will of said Samuel D. Bradford. Rebecca M. Brinley has received no property absolutely under the will of her husband, except some household property; but she has received since January 1, 1876, the income of one quarter of the residuary estate of Samuel D. Bradford of West Roxbury, amounting since the death of her husband to the sum of $156,278.89.

H. G. Parker, for the testator's widow, and *E. L. Rand*, as guardian *ad litem* for persons not known and not in being, contended that the legacies to the three children of the testator, given by article 3 of his will, were specific, and not demonstrative, and were confined to the fund of $125,000.

F. J. Stimson, for the children of the testator, contended that the legacies were demonstrative, and were to be paid out of the whole fund derived from the residuary estate of the testator's father.

HOLMES, J. It may be conjectured with some plausibility that what the testator really had in mind in the third article of his will was the whole trust of one quarter of the residue under his father's will, — a fund which would be sufficient to give all the children their legacies, even on the view that the legacies to them were specific. But, in the opinion of the majority of the court, the description of the fund is so definite as to exclude this construction, which could be reached only by a somewhat violent transposition of language which is plain as it stands.

The case between the widow and children, therefore, must depend upon the question whether the legacies to the children are specific or demonstrative.

We must assume that the testator remembered that, before the date of the will, he had conveyed away the West Roxbury homestead mentioned in article 8, as the will does not necessarily imply the contrary. The homestead is only mentioned

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as part of the property left by the testator's father to be disposed of by the testator, subject to his mother's life interest, and serves to identify the fund referred to. But the testator only affects to dispose of the property which "is" liable to be disposed of by him, or of the income if his power "extends" no further than to dispose of the income, — using the present tense and words which are satisfied without attributing to him an attempt to devise the homestead which he no longer owned.

The fund in question, therefore, could not be more than $150,000, or possibly $175,000, because that was the largest sum which could come to him under the clauses of his father's will referred to. And as he directed that his wife should receive the whole income of the fund until the time for setting apart the first $100,000, and the income of what remained after each sum of $100,000 was set apart, the testator could not have expected the fund to be increased by accumulations. It follows that he could not have expected the three funds of $100,000 each to be raised from property by no possibility amounting to more than $175,000. We may add a further consideration. The testator contemplates in terms the possibility that his power may extend no further than to dispose of the income of the specific property mentioned. This makes it still harder to suppose that he relied on this property alone. The reason for the testator's doubt points the same way. The property which he deals with in the third article did not come to him as a separate fund, but was left to him along with that which he disposes of in article 1, as part of the residue under his father's will. For, although his father's will created a separate fund of $300,000, at least $250,000 of it was to be paid into the residuary fund upon his father's widow's decease, and his own title was only under the residuary clause, making the present testator and his brother residuary legatees, and giving one half of his half to the present testator outright, and the other half in trust for him or his family, &c. Hence the testator actually received his share of the $300,000 as part of a larger fund, and the separation of a part of the residue from the rest with reference to its remote origin is purely imaginary.

The testator does not say that the sums for the other children after the first shall be raised from the property mentioned in

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article 3, but simply that they shall be set apart. He then goes on to empower his wife to give his children any part of the capital mentioned in this or in the first article, "except such portion thereof" as may have been set apart, or may be needed to constitute the funds of $100,000. "Thereof" refers grammatically to the capital mentioned in the first article, as well as to that mentioned in the third; and on its face the clause imports that a portion of the capital mentioned in the first article may be needed to constitute the funds. In view of the arbitrary character of the separation between the capitals mentioned in the two articles, and the certainty that the fund mentioned in the third article would be insufficient, this interpretation seems not only grammatical, but reasonable.

The whole difficulty is raised by the direction, when the first child reaches majority, "to set apart out of the said property," i. e. out of the $150,000, "a fund for the benefit of said child, consisting of money or securities, or partly of money and partly of securities, to the amount or value of one hundred thousand dollars." It is argued that this legacy is specific; and that the direction to "set apart" "similar" funds for the other children must be taken to mean legacies of the same character, and is further shown to have this meaning by the provision that the testator's wife shall continue to have the use, &c. of the remainder of the property.

Whether the legacy to the first child is specific or not, it cannot be allowed to cut down or to limit the legacies of like amounts to the other children, which are not made specific in terms. The testator shows by articles 4 and 5 that he means his children to share his property equally, while the result of holding all the legacies specific would be to give the first child $100,000, if the fund was sufficient, the second not more than $75,000, and the third nothing, and the facts leading to this result were known to the testator.

The gift of the use of the remainder of the property to the testator's wife is made sensible by taking "the property" to include that mentioned in the first article, of which also she is given the use for life. When the specific property of $150,000 is referred to earlier in the article, it is referred to as "the said property." In this connection, again, the arbitrary character

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of the separation of the property mentioned in article 8 should be kept in mind.

There is enough to pay the legacy to the first child, upon any construction of the will. The result will be the same, whether we suppose that the testator began by specifically disposing of the fund described, and then, for the sake of equality, gave to the other children general legacies of the same amount as the specific legacy to the eldest, or say that all the legacies are demonstrative. Many cases of weight, although not binding upon us as authority, go far towards deciding that the legacy to the first child, if it stood alone, even, should be regarded as demonstrative. It is unnecessary to consider how far they are reconcilable with *Bliss* v. *American Bible Society*, 2 Allen, 334, and other Massachusetts cases. See *Boys* v. *Williams*, 2 Russ. & Myl. 689; *Cunliffe* v. *Cunliffe*, 23 W. R. 724; *Sparrow* v. *Josselyn*, 16 Beav. 135; *Vickers* v. *Pound*, 6 H. L. Cas. 885; *Mytton* v. *Mytton*, 44 L. J. Ch. 18; *Bowen* v. *Dorrance*, 12 R. I. 269.

For these reasons, a majority of the court are of opinion that, as article 1 is in the nature of a residuary clause, and the gift to the testator's widow is subject to the provisions of the other articles, the legacies of $100,000 to each of the children must be paid in full. *Decree accordingly.*

WILLARD M. BLISS, administrator, *vs.* INHABITANTS OF SOUTH HADLEY.

Hampshire. Sept. 20. — Oct. 19, 1887. C. ALLEN & HOLMES, JJ., absent.

A child one year and ten months old was sent by his mother into the street in a country village for air and exercise, in the charge of a brother eight years old, who had been accustomed to take charge of him. They went across the street and stood for a time watching some other boys at play, the elder child not having hold of the younger's hand. The younger child, without being noticed by the elder, left his side and started to cross the street alone, and, upon being seen and called by the elder, who ran after him, he ran, fell down, and rolled into a gutter at the side of the street, which had been filled with water for a long time by reason of an obstructed culvert, and received injuries which caused his death. Both of the child's parents and the elder brother knew of the existence

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of this water. *Held*, in an action against the town, under the Pub. Sts. *c.* 52, § 17, that it could not be ruled as matter of law that the child's parents or his brother were not in the exercise of due care; and that it was competent for the jury to find that the children were travellers on the highway.

TORT, by the administrator of the estate of Frank E. Bliss, under the Pub. Sts. *c.* 52, § 17, for the loss of the life of his intestate on April 22, 1885, occasioned by an alleged defect in Grant Street and Bridge Street, in South Hadley. Trial in the Superior Court, before *Barker*, J., who allowed a bill of exceptions, in substance as follows:

The intestate was, at the time of his death, April 22, 1885, one year and ten months old, and the alleged injury occurred two weeks before. The plaintiff resided, with his wife and four children, of whom the intestate was one, in Grant Street, and about five rods from its intersection with Bridge Street. On the opposite side of Grant Street, and extending to Bridge Street, the gutter between the worked roadway and the sidewalk was filled with water by reason of an obstructed culvert, and had remained so for many days. The intestate fell into this water; and there was evidence tending to show that that was the cause of his sickness and death.

The plaintiff testified that, at the time of the accident, he had lived in the same house about three and a half years; that his family at that time consisted of his wife, a boy named Warren, ten years old, Leon, eight years old, a child next younger named Jesse, and the one who died, Frank, who was one year and ten months old; that he was away from home at the time of the accident; that his child was strong and healthy, and accustomed to be out on the street and about there; that Leon was always very good to take care of him, and had been out with him many times; that he had noticed the place at the corner of Grant Street and Bridge Street; that there was water on Grant Street at the corner of Bridge Street, across the road from where the witness lived, and it extended back from Bridge Street fifteen or twenty rods on Grant Street; that it might have been eight feet across and three feet deep; that it was in very nearly the same condition on the morning of the accident as it had been before; that he knew the water had been there for three or four years, more or less; that he saw it that morning

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as he went to work; and that he knew it was a bad place for children.

Ellen Bliss, the mother of the intestate, testified that her husband went away that morning a little before seven o'clock; that she was at work washing; that it was a nice day, and she kept Leon at home from school to take Frank out for air and exercise; that they went out about nine o'clock in the morning; that she did not notice which way they went; that the next she knew about it, some one called that her baby was drowning; that she ran out and met some one bringing him; that she carried him home and took proper care of him until he died; that Leon had taken him out before, every time it was pleasant; that she had noticed this water on the opposite side of Grant Street and towards Bridge Street, and saw it that morning about half-past eight o'clock; that Frank was accustomed to play with Leon; that she thought somebody would fall in the water some time, and that there was danger for school children, but did not think of her own; and that she knew it was a dangerous place.

Leon Bliss testified that he remembered going out with his brother; that they went over the sidewalk, across Bridge Street, where there were two boys about as large as himself playing a game; that they stayed there a good while; that Leon was not playing; that Frank was standing there with him, but he did not have hold of his hand; that Frank, without saying anything, and without Leon's noticing it, went across the road towards the house; that Frank was half-way across the road when he saw him, and he then ran after him and called to him, and Frank ran, fell down, and rolled into the water, which covered him all over; and that he knew that this water was on the street in the ditch near the sidewalk, but had not known of any one's falling into it before his brother fell in.

Hannah Cummings testified that she lived at the corner of Grant Street and Bridge Street; that she saw the children as they went out, and saw them go across Bridge Street, and stand there with other boys; that they were over there a few minutes, she did not know exactly how long; that she looked up and saw Frank coming across the street, and hallooed, but Leon did not hear her; that she hallooed again, and Leon ran; that

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she saw Frank fall into the water; that she had seen the children about together a great many times; and that Leon always took good care of his brother, but did not keep hold of his hand always.

There was no other evidence on the question of due care, or whether the intestate was a traveller on the highway.

The defendant asked the judge to rule that there was no evidence that the plaintiff's intestate was in the exercise of due care; that there was no evidence that he was a traveller on the highway; and that, on all the evidence on these points, the plaintiff could not recover.

The judge refused so to rule, and submitted the case to the jury, with full instructions, not otherwise excepted to.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. C. Hammond, for the defendant.

D. W. Bond, for the plaintiff.

MORTON, C. J. It cannot be said, as matter of law, that it was negligence on the part of the parents of the intestate to send him into the street for air and exercise in the charge of his brother Leon, who was eight years old. It was a question of fact, depending upon how much the street was used, and upon the intelligence, capacity, and experience of Leon, and was properly submitted to the jury. The evidence does not disclose any decisive act of negligence on the part of Leon, and it was for the jury to determine whether he was exercising reasonable diligence in the care of his infant brother.

It was competent for the jury to find that the ... travellers. They were using the street for air a... The fact that they stopped for a few minutes to ... boys at play was one of the natural and ordinary ... travel, and did not divest them of their rights ... *Gulline* v. *Lowell*, 144 Mass. 491. *Exceptio...*

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ISAAC N. TAYLOR, JR., *vs.* MATTHEW CARROLL.

Hampshire. Sept. 20. — Oct. 19, 1887. C. ALLEN & HOLMES, JJ., absent.

A notice in writing, signed by I. T., Jr., the son of a person having the habit of drinking intoxicating liquors to excess, to a seller of such liquors, as follows: "I forbid you selling or delivering liquor to I. T.," is a sufficient compliance with the Pub. Sts. c. 100, § 25.

An adult son, although not dependent for support on his father, is a "child," within the meaning of the Pub. Sts. c. 100, § 25, and may maintain an action against a person selling the father spirituous or intoxicating liquors, after a notice in writing by the son, under the statute, forbidding him so to sell.

TORT, to recover the penalty provided by the Pub. Sts. *c.* 100, § 25,* for selling intoxicating liquors to Isaac N. Taylor, the father of the plaintiff.

At the trial in the Superior Court, before *Knowlton*, J., without a jury, the evidence tended to show that the father of the plaintiff had the habit of drinking intoxicating liquors to excess; and that on or about June 2, 1886, the plaintiff gave the defendant a notice in w follows: "I forbid you selling or deliveri or to or," and signed "I. N. Taylor, Jr." It that the plaintiff was more than twe since he was twenty-one years old he petent to care of and support hi time he port himself without th father; his father did noth- i

fact, t time the defendant , he k e plaintiff's father,

: "T vife, parent, child, guar- who reafter have the habit of ting , may give notice in writ- g him not to sell or deliver he person so notified at any livers any such liquor to the n to loiter on his premises, of tort, recover of the person nor more than five hundred vided, that an employer giving red in his person or property."

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she saw Frank fall into the water; that she had seen the children about together a great many times; and that Leon always took good care of his brother, but did not keep hold of his hand always.

There was no other evidence on the question of due care, or whether the intestate was a traveller on the highway.

The defendant asked the judge to rule that there was no evidence that the plaintiff's intestate was in the exercise of due care; that there was no evidence that he was a traveller on the highway; and that, on all the evidence on these points, the plaintiff could not recover.

The judge refused so to rule, and submitted the case to the jury, with full instructions, not otherwise excepted to.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. C. Hammond, for the defendant.

D. W. Bond, for the plaintiff.

MORTON, C. J. It cannot be said, as matter of law, that it was negligence on the part of the parents of the intestate to send him into the street for air and exercise in the charge of his brother Leon, who was eight years old. It was a question of fact, depending upon how much the street was used, and upon the intelligence, capacity, and experience of Leon, and was properly submitted to the jury. The evidence does not disclose any decisive act of negligence on the part of Leon, and it was for the jury to determine whether he was exercising reasonable diligence in the care of his infant brother.

It was competent for the jury to find that the boys were travellers. They were using the street for air and exercise. The fact that they stopped for a few minutes to watch other boys at play was one of the natural and ordinary incidents of travel, and did not divest them of their rights as travellers. *Gulline* v. *Lowell*, 144 Mass. 491. *Exceptions overruled.*

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ISAAC N. TAYLOR, JR., *vs.* MATTHEW CARROLL.

Hampshire. Sept. 20. — Oct. 19, 1887. C. ALLEN & HOLMES, JJ., absent.

A notice in writing, signed by I. T., Jr., the son of a person having the habit of drinking intoxicating liquors to excess, to a seller of such liquors, as follows: "I forbid you selling or delivering liquor to I. T.," is a sufficient compliance with the Pub. Sts. *c.* 100, § 25.

An adult son, although not dependent for support on his father, is a "child," within the meaning of the Pub. Sts. *c.* 100, § 25, and may maintain an action against a person selling the father spirituous or intoxicating liquors, after a notice in writing by the son, under the statute, forbidding him so to sell.

TORT, to recover the penalty provided by the Pub. Sts. *c.* 100, § 25,* for selling intoxicating liquors to Isaac N. Taylor, the father of the plaintiff.

At the trial in the Superior Court, before *Knowlton*, J., without a jury, the evidence tended to show that the father of the plaintiff had the habit of drinking intoxicating liquors to excess; and that on or about June 2, 1886, the plaintiff gave the defendant a notice in writing, as follows: "I forbid you selling or delivering liquor to I. N. Taylor," and signed "I. N. Taylor, Jr."

It appeared in evidence that the plaintiff was more than twenty-four years old; that since he was twenty-one years old he had been able and competent to take care of and support himself; that during that time he did support himself without the aid or assistance of his father; and that his father did nothing towards his support.

The judge found as a fact, that, at the time the defendant received the written notice, he knew that the plaintiff's father,

* This section is as follows: "The husband, wife, parent, child, guardian, or employer of a person who has or may hereafter have the habit of drinking spirituous or intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person, requesting him not to sell or deliver such liquor to the person having such habit. If the person so notified at any time within twelve months thereafter sells or delivers any such liquor to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may, in an action of tort, recover of the person notified such sum, not less than one hundred nor more than five hundred dollars, as may be assessed as damages: provided, that an employer giving such notice shall not recover unless he is injured in his person or property."

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the person named in it, had the habit of drinking intoxicating liquors to excess; and that the defendant understood the purpose for which the notice was given.

The defendant asked the judge to rule as follows: "1. The written notice claimed to have been given by the plaintiff to the defendant was not a sufficient compliance with the provisions of the Pub. Sts. *c.* 100, § 25, and for that reason the plaintiff cannot recover. 2. The plaintiff being more than twenty-one years old on September 1, 1885, and since he came of age not having been dependent upon his father for support, he cannot maintain this action."

The judge refused so to rule; ruled that the notice was sufficient; and found for the plaintiff in the sum of $150. The defendant alleged exceptions.

J. B. O'Donnell, for the defendant.

J. B. Bottum, for the plaintiff.

MORTON, C. J. We are of opinion that the notice in this case was a sufficient compliance with the statute. The meaning of the notice is clear. It is a notice by a son to the defendant, requesting him not to sell intoxicating liquor to his father. The signature imports that the signer is the son of the I. N. Taylor named in the body of the notice. The defendant, upon receiving the notice, would naturally understand its meaning and purpose, and it is found that he did in fact so understand it. If he sold intoxicating liquor to the father after receiving the notice, he did so at his peril. *Kennedy* v. *Saunders*, 142 Mass. 9. *Tate* v. *Donovan*, 143 Mass. 590.

The ground taken by the defendant, that the action cannot be maintained because the plaintiff was of age and was not dependent upon his father for support, cannot be sustained. The statute provides that "the husband, wife, parent, child, guardian, or employer of a person who has or may hereafter have the habit of drinking spirituous or intoxicating liquor to excess," may give the notice and maintain the action provided by the statute. This does not limit the right to bring the action to a minor child. The statute contemplates that the habitual drunkenness of a husband or wife, parent or child, is a substantial injury to those bound together in domestic relations, and gives such a right to recover damages in the nature of a penalty, not only for any

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injury to the person or property, but for the shame and disgrace brought upon them. Unless this is the construction of the statute, the proviso that an employer "shall not recover unless he is injured in his person or property" is senseless.

The right of a son to recover does not depend upon the question whether he is dependent upon and looks to the father for support; it depends solely upon the relation of father and son. An adult son may maintain the action after giving the notice required by the statute. *Exceptions overruled.*

COMMONWEALTH *vs.* CHARLES S. CLIFFORD.

Worcester. October 3. — 19, 1887. C. ALLEN & KNOWLTON, JJ., absent.

At the trial of an indictment for adultery, the evidence was conflicting upon the question whether the parties named in the indictment had occupied the same room; and the judge instructed the jury as follows: "If they occupied together the room known as the parlor, that is evidence enough to warrant you in finding adultery. That is as strong evidence as is usually found in adultery cases." This being excepted to, the judge said, "I withdraw those instructions and instruct the jury as follows: If a married man is found with a woman not his wife in a room with a bed in it, and stays through the night with her there, that is sufficient to warrant a finding of adultery against him." *Held*, that the defendant had no ground of exception.

Under the Pub. Sts. c. 153, § 12, the judge presiding at the trial of a criminal case may, before exceptions taken to his rulings are reduced to writing and filed, pronounce them frivolous and intended for delay, and proceed to sentence the defendant.

HOLMES, J. 1. This is an indictment for adultery. It is not denied that there was evidence for the consideration of the jury, but the principal exception taken is that the court charged the jury with respect to matters of fact. The instruction first given related to disputed evidence that the parties had occupied the same room, and was as follows: "If they occupied together the room known as the parlor, that is evidence enough to warrant you in finding adultery. That is as strong evidence as is usually found in adultery cases." This being excepted to, the court said, "I withdraw those instructions and instruct the jury as follows: If a married man is found with a woman not his wife

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in a room with a bed in it, and stays through the night with her there, that is sufficient to warrant a finding of adultery against him." This also was excepted to.

The first instruction did not express any opinion as to whether the facts testified to were proved, but went to the inferences to be drawn from those facts by way of presumption in case they were proved. Such inferences, however, are for the jury as a general rule, as well as the truth of the testimony. *Commonwealth* v. *Briant*, 142 Mass. 463. But if the language first used went too far, the judge at once expressly withdrew and corrected it upon his attention being called to it, and limited his statement to the proposition that the supposed facts, if proved, would be sufficient to warrant a finding of guilty. Even the latter form of expression might be used in such a way as to prejudice the jury; but, on its face, it only means that there is evidence to be considered by the jury, and that they have a right to infer guilt if that inference seems to them the true one. Such a ruling is unexceptionable, and the correction left the defendant without ground of complaint. *Eldridge* v. *Hawley*, 115 Mass. 410. *Goodnow* v. *Hill*, 125 Mass. 587.

2. Before the foregoing exceptions were reduced to writing and filed, the court adjudged them frivolous and intended for delay, and proceeded to sentence the defendant. This also is excepted to. We have no doubt of the power of the court to pass upon the exceptions before they are filed or allowed. The scope of an exception is fixed by the ruling. The court knows what it rules, and in many cases can have no difficulty in pronouncing an exception frivolous at the moment when it is taken. If the language of the statute leads to any conclusion, it is to that which we have adopted. It is to the effect that, if the exceptions appear frivolous, &c., sentence may be passed, "notwithstanding the allowance of the exceptions," that is, even if the exceptions are allowed. Pub. Sts. *c.* 153, § 12.

Exceptions overruled.

J. Hopkins & C. R. Johnson, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

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COMMONWEALTH *vs.* MICHAEL SHANNIHAN.

Worcester. October 3. — 19, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A complaint on the Pub. Sts. *c.* 98, § 2, for unlawfully keeping open a shop on the Lord's day, need not negative the exceptions contained in the St. of 1887, *c.* 391, § 2.

COMPLAINT on the Pub. Sts. *c.* 98, § 2, alleging that the defendant, on July 24, 1887, the same being the Lord's day, at Worcester, "did unlawfully keep open his shop there situate, for the purpose of doing business therein, to wit, selling goods, wares, and merchandise therein on said Lord's day, as aforesaid, the same not being works of necessity or charity."

In the Superior Court, on appeal, before the jury were empanelled, the defendant moved to quash the complaint, "because nowhere in the complaint is it alleged that the defendant does not come within the exceptions mentioned in" the St. of 1887, *c.* 391, § 2. *Pitman*, J., overruled the motion.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. E. Sullivan, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

BY THE COURT. This is a complaint under the Pub. Sts. *c.* 98, § 2, which prohibits the keeping open of a shop, warehouse, or workhouse on the Lord's day. Section 2 of the St. of 1887, *c.* 391, makes certain exceptions to this general provision; but, according to the rule established in this Commonwealth, such exceptions need not be negatived in a complaint or indictment. *Commonwealth* v. *Jennings*, 121 Mass. 47. The complaint in this case sets forth a complete offence; if the defendant is within any of the exceptions, it is matter of defence.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN HARPER.

Worcester. October 3. — 19, 1887. C. ALLEN & KNOWLTON, JJ., absent.

At the trial of a complaint, under the Pub. Sts. *c.* 100, § 17, alleging that the defendant brought into a certain city spirituous and intoxicating liquors, he having reasonable cause to believe that such liquors were intended to be sold in violation of law, the evidence showed that the defendant brought into the city from a certain town various packages of liquors, some of which were consigned to one D. *Held*, that evidence of a police officer of the city, as to his search of D.'s place three days before the date of the defendant's alleged offence, as to what he found there, and as to D.'s acts and conduct, was competent. *Held*, *also*, that it was competent for the government to show, on the issue whether the defendant had reasonable cause to believe that D. intended to sell such liquors in violation of law, that, on the day of the alleged offence, D. was generally known and reputed to be a dealer in intoxicating liquors at his place.

MORTON, C. J. This complaint, under the Pub. Sts. *c.* 100, § 17, charges that the defendant, on June 12, 1886, brought into Worcester spirituous and intoxicating liquors, he having reasonable cause to believe that such liquors were intended to be sold in violation of law. The evidence showed that the defendant brought into Worcester from Millbury various packages of liquors, some of which were consigned to one Dolan. It was necessary for the government to show that the consignee intended to sell the liquors in violation of law. For this purpose the evidence of the assistant marshal, as to his search of Dolan's place on June 9, 1886, three days before the day on which the offence was alleged to have been committed by the defendant, as to what he found there, and as to Dolan's acts and conduct, was competent. It tended to prove that Dolan kept a place for the sale of liquor, and that he intended to sell the liquor which the defendant was carrying to him. *Commonwealth* v. *Locke*, 114 Mass. 288. *Commonwealth* v. *Intoxicating Liquors*, 107 Mass. 386. *Commonwealth* v. *McLaughlin*, 108 Mass. 477. *Commonwealth* v. *Kenney*, 115 Mass. 149.

It was competent for the government to show that, on June 12, 1886, Dolan was generally known and reputed to be a dealer in intoxicating liquors at his place. It had some tendency to prove that the defendant, whose employment was carrying and

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delivering liquor from a wholesale establishment in Millbury to various persons in Worcester, had reasonable cause to believe that the liquors he was carrying to Dolan were intended for sale in violation of law. It was not used to show that Dolan intended to sell in violation of law, but the court carefully confined it to the issue whether the defendant had reasonable cause of belief that it was intended for illegal sale. Upon this issue it was admissible. *Sweetser* v. *Bates*, 117 Mass. 466, and cases cited. *Exceptions overruled.*

J. Hopkins, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

COMMONWEALTH *vs.* MICHAEL W. DUNSTER.

Worcester. October 3. — 19, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A conviction on a complaint for keeping and maintaining a tenement for the illegal sale and illegal keeping of intoxicating liquors from August 1 to October 4, is a bar to a complaint for keeping the same tenement for the same purpose from May 1 to November 17 of the same year; and the government has no authority to enter a *nolle prosequi* as to so much of the offence as is charged in the second complaint to have been committed prior to October 5.

MORTON, C. J. This is a complaint to the Central District Court of Worcester, which charges that the defendant, "on the first day of May in the year eighteen hundred and eighty-six, at Worcester in said county, and on divers other days and times between that day and the seventeenth day of November in the year eighteen hundred and eighty-six, did keep and maintain a certain tenement there situate, then and there used for the illegal sale and for the illegal keeping of intoxicating liquors."

The defendant was convicted in the district court, and appealed to the Superior Court. In the latter court, before empanelling the jury, the district attorney indorsed on the back of the complaint the following: "Now before the empanelling

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of the jury I 'noll. pros.' so much of the within complaint as alleges any offence or unlawful act prior to October 5, 1886." The defendant objected to the district attorney's right to do this, and afterwards filed a plea in bar, setting up a former conviction under a complaint charging him with keeping and maintaining the same tenement from the first day of August, 1886, to the fourth day of October, 1886.

It is too clear to admit of any doubt, that the defendant's former conviction was a bar to the present complaint as it stood in the district court, as the complaint in this case embraced a portion of the time covered by the former complaint, and both complaints might be proved by the same evidence.

The question is whether the district attorney, after the case was entered in the Superior Court, could avoid the effect of the former conviction as a bar by entering a *nolle prosequi* in the manner attempted in this case.

Where a complaint or indictment contains several counts, each charging an offence, it is within the power of the prosecuting officer, before the jury are empanelled, to enter a *nolle prosequi* as to either count. So, where two offences are improperly charged in one count, he may enter a *nolle prosequi* as to one of them, and where, as in the exceptional case of burglary, both breaking and entering with intent to steal and larceny are properly charged in one count, he may enter a *nolle prosequi* as to either of the charges. And, generally, where an offence is set out with aggravating circumstances, which enlarge the offence, he may enter a *nolle prosequi* as to the aggravation, and obtain a conviction for the lesser offence which is well charged. *Commonwealth* v. *M'Monagle*, 1 Mass. 517. *Commonwealth* v. *Briggs*, 7 Pick. 177. *Commonwealth* v. *Tuck*, 20 Pick. 356. *Commonwealth* v. *Jenks*, 1 Gray, 490. *Commonwealth* v. *Mead*, 10 Allen, 396. *Commonwealth* v. *Cain*, 102 Mass. 487. *Jennings* v. *Commonwealth*, 105 Mass. 586. *Commonwealth* v. *Holmes*, 119 Mass. 195.

But, in all these cases, the matter upon which the *nolle prosequi* operates is a distinct and independent charge, and, when entered, the *nolle prosequi* leaves an offence formally as well as substantially charged, being the same offence which is formally charged in the original complaint or indictment. The

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prosecuting officer cannot, by means of a *nolle prosequi*, put the defendant upon trial for an offence differing from any offence with which he is formally charged in the complaint or indictment.

The difficulty in this case is, that there is no distinct offence alleged upon which the *nolle prosequi* can operate, and yet leave an offence sufficiently charged in the complaint upon which the defendant can be convicted. The offence charged in the complaint, of maintaining a tenement used for the illegal sale and the illegal keeping for sale of intoxicating liquors from the first day of May, 1886, to the seventeenth day of November, 1886, is a single and indivisible offence, of which the time alleged is an essential element. This is the offence, and the only offence, for which the defendant was tried in the district court.

As we have said, the allegation of time is material; it operates not only to limit the testimony to acts within the time named, but also to protect the defendant from any future prosecution for his acts within the time alleged. It is not competent for the prosecuting officer, by entering a *nolle prosequi* as to a part, to amend a complaint in the material allegation of time; by so doing, he puts the defendant to trial upon an offence differing legally from that for which he was tried in the district court, and from the offence which is "fully and plainly, substantially and formally," described in the complaint which is before the Superior Court upon appeal.

In *Commonwealth* v. *Robinson*, 126 Mass. 259, the defendant was complained of for keeping a tenement used for the illegal sale of intoxicating liquors from January 1, 1878, to August 20 of the same year. He filed a plea of an acquittal upon a complaint for keeping the same tenement for the same purpose from January 1 to May 28 of the same year. This court held that such acquittal was a bar, although the Superior Court confined the government to proof of acts subsequent to May 28, and prior to August 20. The prosecuting officer did not in that case enter a *nolle prosequi*, and in this respect the case differs from the case before us; but the principles upon which it proceeds are applicable, and seem to us to be conclusive of this case. The former conviction is a bar to the whole of the offence set out in the complaint; the prosecuting officer cannot defeat this

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defence by entering a *nolle prosequi* as to a part of the offence, any more than he can do so by confining his proofs to facts not included in the former complaint.

Exceptions sustained.

J. E. Sullivan, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

COMMONWEALTH *vs.* THOMAS GALLAGHER.

Plymouth. October 18. — 19, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A complaint on the Pub. Sts. c. 101, §§ 6, 7, alleging that the defendant, at a place and on a day named, and on divers other days and times between that day and the day of making the complaint, "is guilty of keeping and maintaining a certain tenement, then and there used for the illegal keeping and illegal sale of intoxicating liquors," is sufficient.

COMPLAINT to the Third District Court of Plymouth, on the Pub. Sts. *c.* 101, §§ 6, 7, dated November 17, 1886, alleging that the defendant, at Plymouth, on September 17, 1886, and on divers other days and times between that day and the day of making the complaint, "is guilty of keeping and maintaining a certain tenement, then and there used for the illegal keeping and illegal sale of intoxicating liquors, to the great damage and common nuisance of all the peaceable citizens of the Commonwealth there residing and passing, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

At the trial in the district court, the defendant moved to quash the complaint, which motion was overruled, and the defendant found guilty.

At the trial in the Superior Court, before *Thompson*, J., the jury returned a verdict of guilty; and the defendant moved in arrest of judgment, on the ground that the complaint set forth no offence under the statutes of this Commonwealth. This motion was overruled, and the defendant alleged exceptions.

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J. F. Simmons, for the defendant, cited *Commonwealth* v. *Miller*, 8 Gray, 484, 486; *Commonwealth* v. *McNamara*, 116 Mass. 340; Whart. Cr. Pl. (8th ed.) §§ 132, 133.

A. J. Waterman, Attorney General, for the Commonwealth.

BY THE COURT. The allegation in the complaint, that the defendant "is guilty of keeping and maintaining a certain tenement," is equivalent to an allegation that he "did keep and maintain a certain tenement." It means the same thing, and the defendant could not have misunderstood it. Taken with its context, it is susceptible of no other meaning. Though this form of allegation is not to be commended, it is not uncertain, and does not furnish reason for quashing the complaint.

Exceptions overruled.

HARLAN E. NASH, executor, *vs.* INHABITANTS OF SOUTH HADLEY.

Hampshire. Sept. 20. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

If a person, who has been injured by a defect in a highway in a town, lives more than ten days in a condition in which it is possible for him to give to the town the notice required by the Pub. Sts. c. 52, § 19, and fails to do so, the person named as executor in his will is not entitled, under § 21, to give such notice within thirty days after the death of the testator, but before his appointment as executor.

TORT, by the executor of the will of Erastus Nash, for personal injuries occasioned to the testator by a defect in a highway in the defendant town. Trial in the Superior Court, before *Mason*, J., who ruled that the action could not be maintained, and ordered a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

D. W. Bond, for the plaintiff.

R. O. Dwight, for the defendant.

DEVENS, J. In the case at bar, the person injured lived more than ten days in a condition in which it was possible for him to have given the notice required by statute, as preliminary

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to an action against the town for the injury sustained by him. *Mitchell* v. *Worcester*, 129 Mass. 525. Pub. Sts. *c.* 52, §§ 19, 21. The notice, which is claimed to be sufficient under the statute, was in fact given by his son within thirty days after the decease of the injured person, the son being the executor named in his will, and having been, subsequently to the giving of such notice, appointed executor, upon the probate of the will. Without passing upon the question whether a notice given by one who is subsequently appointed executor of an injured person is now sufficient, although given previously to his appointment as such, if it is in other respects in compliance with the statute, we proceed to consider the contention of the plaintiff, that a sufficient notice may be given by an executor, even when the person injured has survived ten days or more, not exceeding thirty days, and during that time was himself of sufficient capacity to give a notice.

The Pub. Sts. *c.* 52, § 19, have provided that a notice in writing shall be given by the person injured, or by some one on his behalf, within thirty days after the injury, to the town alleged to be responsible therefor; "but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is removed, and in case of his death without having given the notice, and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment." Pub. Sts. *c.* 52, § 21.

It was held in *Taylor* v. *Woburn*, 130 Mass. 494, that a notice might be given by one who was the father of the person injured, who was entitled to administer on his estate, and who was afterwards appointed administrator, as a person giving it on his behalf. That case was decided under the St. of 1877, *c.* 234, which statute contained in terms no provision for any notice which might be given by an executor or administrator. Such provision is first found in the St. of 1881, *c.* 236, and is embodied in the Pub. Sts. *c.* 52, § 21, above recited. The plaintiff urges that this case is governed by precisely the same rules of law, in respect to the death of the person injured without giving notice,

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as in the case of *Taylor* v. *Woburn*. But this argument loses sight of the fact, that, since that case was decided, provision has been made for the circumstances under which an executor or administrator may give notice, and that the case at bar is not within them. It is true, that, if the law had remained as it was when *Taylor* v. *Woburn* was decided, the notice in the case at bar would, under that decision, have been held sufficient. But when the Legislature has provided for the circumstances under which a notice may be given by an executor or administrator, it must be understood that it has dealt with the whole subject, and has provided for all the cases in which a notice by either of them will be sufficient. If the effect of this is to deprive a person, or one who represents him, of a right which he might otherwise have had, such effect must be held to have been contemplated by the Legislature. The liability to which towns are subjected for injuries caused by defective ways is entirely statutory, and the provisions of the statute in regard to notice must be followed in order to subject them to it. The construction by which it was held in *Taylor* v. *Woburn* that "the statute authority for another to act for the person interested, and the clear purpose manifested thus to act in behalf of his deceased son," on the part of the father, authorized the decision that a notice given after the decease of the son, by the father, within thirty days after the injury, was sufficient, is not permissible after the Legislature has provided by whom and under what circumstances a notice shall be given when the party injured has died. The rule thus prescribed is the only one to be followed. *Exceptions overruled.*

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CITY OF NORTHAMPTON *vs.* COUNTY COMMISSIONERS OF HAMPSHIRE.

Hampshire. Sept. 20. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

Section 4 of the St. of 1849, *c.* 96, (which statute incorporated the Trustees of the Smith Charities,) providing that the funds of the corporation shall, for the purpose of taxation, "be equally apportioned among the eight towns named in said will, ... or such of them as shall not have forfeited their rights therein; and said apportionment shall be made, and the assessors of each of said towns shall be notified of the same by the trustees provided for in said will, on or before the first day of May annually; and the portions of said funds thus assigned to the said towns respectively may be assessed therein, in all the taxes legally voted and assessed by said towns," is constitutional.

PETITION for a writ of certiorari, to quash the proceedings of the respondents in abating part of a tax assessed by the petitioner upon personal property in the hands of the Trustees of the Smith Charities, a corporation incorporated by the St. of 1849, *c.* 96. Hearing before *Holmes*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

A. T. Crossley, for the petitioner.

D. W. Bond & J. C. Hammond, for the respondents.

DEVENS, J. The Trustees of the Smith Charities were incorporated by the St. of 1849, *c.* 96. The fourth section of this act provides that no part of the funds of the corporation shall, by the operation of the act, be exempted from taxation; and enacts that, "for the purpose of taxation, said funds shall be equally apportioned among the eight towns named in said will, to wit: Northampton, Hadley, Amherst, Hatfield, Williamsburg, Whately, Deerfield, and Greenfield, or such of them as shall not have forfeited their rights therein; and said apportionment shall be made, and the assessors of each of said towns shall be notified of the same by the trustees provided for in said will, on or before the first day of May annually; and the portions of said funds thus assigned to the said towns respectively may be assessed therein, in all the taxes legally voted and assessed by said towns."

The corporation made a correct apportionment (as appears by the answer of the respondents) of their taxable funds among the

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eight towns according to this section. The county commissioners have allowed an abatement of seven eighths of the tax assessed by Northampton, which was upon the whole of these funds, and have in effect decided that Northampton was entitled to tax only one eighth of them. This decision is in accordance with the statute, but the petitioner contends that the act is in this respect unconstitutional; and, further, that it has therefore the right to tax the whole of the funds held by the corporation which are personal property. The ground on which the petitioner relies is, that the tax provided for by the statute is not reasonable, and proportional under that Article of the Constitution (*c.* 1, § 1, art. 4) which authorizes the General Court "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances," &c., "and to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth."

It is a familiar principle, that a party assailing the constitutionality of an act must show, beyond reasonable doubt, that it is in violation of the fundamental principles of our government. Every presumption is in favor of the validity of a legislative act. It is for the petitioner to show that its rights are invaded by this legislative act; that the act does not come within the legitimate exercise of the powers conferred by the Constitution; and that it has (this act being pronounced unconstitutional) under some other act an authority to lay the tax in question. It is obvious that the principal, perhaps the only, object of the constitutional provision that taxes shall be "proportional and reasonable," is the protection of the tax-payer against any arbitrary, unjust, or oppressive exercise of the power of taxation. If, for instance, the Legislature should arbitrarily designate a certain class of persons on whom, or a certain class of property on which, a tax was to be imposed, without reference to any rule of proportion, or without regard to the share of the public charge which either should bear relatively to that borne by other persons or property, or without regard to any special benefit which might accrue to the property subjected to the tax, such imposition would be unlawful. *Oliver* v. *Washington Mills*, 11 Allen, 268. *Dorgan* v. *Boston*, 12 Allen, 223.

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In the case at bar, the party upon whom the tax is imposed makes no complaint of the statute under which it is imposed, and the clause of the Constitution would seem to have no reference to the town or other corporation ordinarily invested with the taxing power, or to the mode in which the tax imposed is to be divided or distributed. But, if this is otherwise, we can find no ground for pronouncing the tax unreasonable or not proportional. The principal beneficiaries under the Smith will are inhabitants of the eight towns in the Commonwealth, described in the petition. If the fund intended mainly for their use is to be diminished by taxation, it would seem reasonable that the towns whose indigent persons are the immediate objects of the testator's bounty should have the benefit of it. Exact equality or proportion in the imposition of public taxes, or distribution of public burdens requiring taxation, it is practically impossible to secure. *Cheshire* v. *County Commissioners*, 118 Mass. 386.

The petitioner argues that, as the place where the business of the corporation is to be done is Northampton, this city is entitled as of right to tax the whole of its personal property. It is a general rule under our statutes that real estate is to be taxed where it is situate, and personal property where the owner resides, but to this there are many exceptions. The Legislature may treat as realty, for the purposes of taxation, that which is not so by the common law, and may provide for taxation of personal property in places other than that where the owner resides. Thus, shares of stock in banks are assessed to the owners thereof where the bank is located. Pub. Sts. *c.* 13, § 8. Live stock, when kept throughout the year in a town other than that where the owner resides, is assessed to the owner in that place. Pub. Sts. *c.* 11, § 20, *cl.* 3. Goods, merchandise, and other stock in trade, in cities or towns within the Commonwealth other than where the owner resides, are taxed where the owners occupy manufactories, stores, &c. Pub. Sts. *c.* 11, § 20, *cl.* 1. The personal property of individuals is thus taxed at a different rate from that which prevails where they reside. The legislation which exists as to the taxation of trust property, or property of that nature, closely resembles that adopted by the Legislature as to the taxation of these funds, and it has certainly always been treated as constitutional. Thus personal property held by a guardian is taxed to the

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guardian, but in the place where the ward is an inhabitant, if in this State. Pub. Sts. *c.* 11, § 20, *cl.* 4. Personal property held in trust by executors, administrators, or trustees, is assessed to them where the beneficiary resides, if in this State. Pub. Sts. *c.* 11, § 20, *cl.* 5. Personal property held by a corporation or individual to accumulate, is assessed where the beneficiaries reside, if in this Commonwealth. Pub. Sts. *c.* 11, § 21.

The objections which the petitioner in the case at bar makes, that the fund is taxed where the securities, &c., are not kept, and that the fractions of it permitted to be taxed are taxed at different rates, according to the exigencies of the different towns entitled to tax, all exist in the general laws relating to the taxation of trust property. It is not necessary, in order that taxes should be proportional, that the rate should be identical in all the municipal corporations of the State. However widely rates may differ, it cannot be held that they are not proportional on account of differences of that nature.

The petitioner also contends that the act is unconstitutional within § 1, art. 14, of the Amendments to the Constitution of the United States, in that it denies to it the equal protection of the laws. We see no ground for this contention, nor has the petitioner suggested any argument in support of it. *Slaughter-House Cases*, 16 Wall. 36.

If we were able to hold § 4 of the St. of 1849, *c.* 96, to be unconstitutional, such a decision would not aid the petitioner, but the contrary. By the Pub. Sts. *c.* 11, § 5, *cl.* 3, the personal property of literary, benevolent, charitable, and scientific institutions is exempt from taxation. This corporation comes within the class of benevolent and charitable institutions. If so much of the act of incorporation as takes it out of the general law and renders its personal property taxable is unconstitutional, it would come under the general law, and its personal property would not be subject to taxation. *Petition dismissed.*

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ORTHODOX CONGREGATIONAL SOCIETY *vs.* INHABITANTS OF GREENWICH.

Hampshire. Sept. 20. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

At the hearing upon a petition, under the Pub. Sts. *c.* 176, to compel the respondent to bring an action to try his alleged title to a parcel of land, the question of title to the land cannot be adjudicated, but only the question whether the petitioner has shown that he is in possession of the land, claiming an estate of freehold therein.

At the hearing upon a petition, brought in 1885, under the Pub. Sts. *c.* 176, by a religious society, to compel the town in which it was located to try its alleged title to the land on which the meeting-house stood, it appeared that the meeting-house was built in 1828 by the town upon a portion of the common belonging to the town; that, by a vote of the town, it was "to be used as a town-house and place for public worship," and the town held its meetings in it up to 1855, when a new town-house was built; that, during this period, several religious societies occupied the building on Sundays by permission of the town; that, since 1855, the building had not been used for the general purposes of a town-house; that the audience-room had been used for religious services solely, except that since 1880 it had been used on seven or eight occasions for public entertainments; that the town had from time to time expended money for repairs of the meeting-house, both inside and outside; that after 1855, as before, the petitioner, since its incorporation in 1865, and the religious society which preceded it, occupied the audience-room by the permission of the town; that the town kept up the old customs of ringing the bell at noon and of tolling it when deaths occurred; and that it had always had access to the vestibule of the meeting-house for these purposes. There was no evidence that this was by the permission of the petitioner, and no evidence of any ouster of the town by the petitioner; and no claim of title adverse to the town was made by the petitioner until 1885, when it voted to contest any claim made to the meeting-house adverse to the petitioner. *Held*, that the petitioner had not shown such an exclusive possession as entitled it to maintain the petition.

PETITION, dated October 17, 1885, under the Pub. Sts. *c.* 176, to compel the respondent to bring an action to try its alleged title to a parcel of land in Greenwich. Hearing before *Holmes*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

F. P. Goulding & E. H. Vaughan, (*W. G. Bassett* with them,) for the petitioner.

D. W. Bond, for the respondent.

MORTON, C. J. Under the Pub. Sts. *c.* 176, "any person in possession of real property, claiming an estate of freehold therein

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or an unexpired term of not less than ten years, may file a petition in the Supreme Judicial Court" against any person making an adverse claim, praying that such person may be summoned to show cause why he should not bring an action to try his alleged title.

The object of the proceeding is not to try the title to the real property; the court cannot make any decree, unless the respondent makes default, which will operate as a conclusive adjudication of the title of either party. If the petitioner prevails, the question of title must be tried in an action at law, brought and prosecuted under such conditions as this court may deem equitable and just.

We cannot in this case, therefore, express any opinion upon the question of the title to the real property in controversy. The only question properly before us is whether the petitioner has shown that it is in possession of the land, claiming an estate of freehold, so as to be within the statute.

It has always been held that, in the provision that "any person in possession of real property claiming an estate of freehold" may bring his petition, the statute contemplates an exclusive and adverse possession which works a disseisin of the respondent; and that, in cases where there is a joint or mixed possession, the petition cannot be maintained. *Tompkins* v. *Wyman*, 116 Mass. 558. *India Wharf* v. *Central Wharf*, 117 Mass. 504. *Leary* v. *Duff*, 137 Mass. 147.

In the case before us, most of the facts stated in the elaborate and interesting report of the master bear only upon the question of title. These we need not consider. But upon such of the facts as touch the question of possession, we are of opinion that the petitioner has not shown a case which entitles it to maintain this petition.

The meeting-house in question was built in 1828, by the town, upon a portion of the common belonging to the town. By the vote of the town, it was "to be used as a town-house and place for public worship," and the town held its meetings in it up to 1855, when a new town-house was built. During this period, several religious societies occupied the building on Sundays by permission of the town. Since 1855, the building has not been used for the general purposes of a town-house; the audience-

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room has been used for religious services solely, except that since 1880 it has been used for "a juvenile concert, one or two public readings, Decoration-day services on two occasions, and two public lectures." The town has from time to time expended money for repairs of the meeting-house, both inside and outside; and the evidence shows that after 1855, as before, the petitioner, since its incorporation in 1865, and the religious society which preceded it, occupied the audience-room by the permission and license of the town. No claim of title adverse to the town appears to have been made by the petitioner until October, 1885, when it voted to contest any claim made to the meeting-house adverse to the petitioner. It further appears, that the town keeps up the old customs of ringing the bell at noon, and of tolling it when deaths occur, and that it has always had access to the vestibule of the meeting-house for these purposes. There is no evidence that this was by the permission of the petitioner. On the contrary, it was an adverse possession and a daily use of a part of the premises by the town, claiming to be the owner. There is no evidence of any ouster of the town by the petitioner.

Upon these facts, we are of opinion that there was a mixed possession; and that the petitioner has not such an exclusive possession as entitles it to maintain this petition. There is no reason why the respondent, rather than the petitioner, should be ousted and compelled to bring an action at law to try the title. *Petition dismissed.*

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MARY O'KEEFE *vs.* CITY OF NORTHAMPTON.

Hampshire. Sept. 20. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

An action against a town for relief furnished a pauper cannot be maintained under the Pub. Sts. *c.* 84, § 27, except upon evidence of an express and formal notice to the overseers of the poor of the town, and a distinct request to them that the pauper be provided for.

An action founded upon an implied contract will not lie against a town for relief furnished a pauper.

In an action against a town for relief furnished a pauper, there was evidence that one of the overseers of the poor, in the absence of his associates, agreed to pay the plaintiff (a married woman then living with her husband, and with whom the husband's father, a pauper, was then living) to take care of the father as long as he lived; that the father lived there until his death; and that the town paid the husband by the month for his support. *Held*, that the evidence was not sufficient to maintain the action.

KNOWLTON, J. The plaintiff seeks to recover for the support of a pauper having a settlement in the town of Northampton before its incorporation as a city. The liability of towns for the support of paupers is purely statutory, and a plaintiff, to recover in an action of this kind, must bring his case within the provisions of the statute. Under our legislation there are only two ways in which a debt can be created in favor of an individual against a town for relieving a pauper: one by supplying his wants after "notice and request to the overseers thereof" to provide for him, and their neglect so to do; the other by furnishing him necessaries under an express contract with its overseers of the poor, or its other duly authorized officers or agents. Pub. Sts. *c.* 84, §§ 2, 27. *Williams* v. *Braintree*, 6 Cush. 399. *Lamson* v. *Newburyport*, 14 Allen, 30. *Rogers* v. *Newbury*, 105 Mass. 533.

The first count of the plaintiff's declaration sets out a claim under the Pub. Sts. *c.* 84, § 27, and alleges "that she applied to the overseers of the poor of the said Northampton, and requested them to make provision for the maintenance and support of the said Michael O'Keefe, which they refused and neglected to do." The notice contemplated by the statute and alleged in the declaration is an express and formal notice, and the request intended

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is a distinct request that the town provide for the pauper; and the right to recover for support furnished, after neglect or refusal in such a case, is founded on the failure of the town to do its duty, and the consequent necessity, in the interest of humanity, that aid be rendered by an individual. *Walker* v. *Southbridge*, 4 Cush. 199. No evidence that the plaintiff gave such a notice or made such a request was introduced at the trial.

The second count is in *indebitatus assumpsit*. The statute gives no right to recover under an implied contract in a case of this kind, and the inquiry comes whether there is evidence of performance of an express contract under which the plaintiff is entitled to compensation. The only evidence of any contract tends to show that one of the overseers of the poor, in the absence of his associates, agreed with the plaintiff to pay her "to take the old man and take care of him as long as he lived." The pauper lived, after that, ten years. The town had a poor-house in which to support its paupers. It does not appear that the overseer had authority to bind the town by this peculiar contract; and, if he had, the plaintiff, to recover under it, must show that she took the pauper and took care of him in accordance with its terms. This she has failed to do. The uncontradicted evidence shows that the old man was then living with his son, the plaintiff's husband, and that he continued to live with him for ten years afterward, the town all the time, with the knowledge and consent of the plaintiff, paying said son by the month for said support. Upon a proper interpretation of the evidence it appears that what the plaintiff did in caring for the pauper, she did on account of her husband, and as his wife, and the jury would not have been warranted in finding that she did anything in performance of the contract testified to by her husband. *Plaintiff's exceptions overruled.*

C. G. Delano, for the plaintiff.

A. T. Crossley, for the defendant.

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COMMONWEALTH *vs.* LUTHER B. BRUSIE.

Berkshire. Sept. 27. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

A complaint on the Pub. Sts. *c.* 101, § 6, alleging the keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, need contain no other allegation negativing an authority to keep or sell intoxicating liquors.

If a complaint is received by the justice of a district court, and is sworn to before him, and he issues a warrant, it is to be presumed that he acted under his authority as justice, and that the court was not in session at the time, although the complaint is stated to have been sworn to before the court.

If a complaint is received by the justice of a district court, and is sworn to before him, and he issues a warrant, it is not necessary that the clerk should sign the jurat or the warrant, or that the warrant should bear the teste of the justice.

An objection to the form of a warrant, issued for the arrest of an accused person by a justice of a district court, for an offence within the jurisdiction of that court, cannot be taken, for the first time, in the Superior Court on appeal.

COMPLAINT to the District Court of Southern Berkshire, on the Pub. Sts. *c.* 101, § 6, for keeping and maintaining a common nuisance, to wit, a certain tenement in Great Barrington, used for the illegal sale and illegal keeping of intoxicating liquors, on May 1, 1886, and on divers other days and times between that day and October 12, 1886. At the trial in the Superior Court, on appeal, the defendant pleaded guilty; and alleged exceptions, which appear in the opinion.

H. C. Joyner, for the defendant.

E. J. Sherman, Attorney General, for the Commonwealth.

DEVENS, J. The motion to dismiss the complaint filed in the district court was there properly overruled. The complaint charged the keeping and maintaining a common nuisance, by keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors. No other allegation negativing an authority to keep or sell intoxicating liquors was essential; and if the defendant relied upon any appointment or authority to sell intoxicating liquors, it was for him to prove it. *Commonwealth* v. *Bennett*, 108 Mass. 27. *Commonwealth* v. *Ryan*, 136 Mass. 436. *Commonwealth* v. *Rafferty*, 133 Mass. 574.

In the Superior Court, the defendant filed a motion to quash the complaint for the following reasons: 1. Because the person

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receiving the complaint had no authority to do so. 2. Because said complaint purports to have been made to the District Court of Southern Berkshire, while the fact is not certified to by the clerk of said court. 3. Because the warrant does not bear the teste of the first justice of said court, and is not signed by the clerk of said court.

Assuming that some of these objections are not merely formal, and that, if well founded, they would go to the jurisdiction of the court, the case at bar is covered by the decision in *Sabins* v. *Jones*, 119 Mass. 167. The Pub. Sts. *c.* 154, § 22, reënacting the Gen. Sts. *c.* 116, § 16, provide that a justice or special justice of a police or district court "may receive complaints and issue warrants, when the court is not in session." The defendant contends that the complaint was made to the court, and that the warrant was issued while the court was in session; but there is no evidence of this. It sufficiently appears by the record that the complaint was received by the justice, and sworn to before him, and that he issued the warrant. Having authority to do this, it is to be presumed that he acted under that authority, and that the court was not in session at the time, although in form the complaint is stated to have been sworn to before the court. Where the complaint is received and sworn to before the justice, and the warrant is issued by him, it is not necessary that the clerk should sign the jurat or the warrant, or that the warrant should bear the teste of the justice of the district court. These requirements (*c.* 154, § 30) apply to proceedings before the court, and not to those before the justice acting by the authority given him to be exercised when the court is not in session.

An objection to the form of the warrant on account of any irregularity therein, where the court below has jurisdiction, must appear to have been taken there. *Commonwealth* v. *Hart*, 123 Mass. 416. *Exceptions overruled.*

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COMMONWEALTH *vs.* VALENTINE EWIG.

Hampden. Sept. 27. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

On a complaint for selling intoxicating liquors, there was evidence that there was a delivery of liquor by the steward of a club to one of the members of the club, who paid for it, in a city which had voted to grant licenses to sell intoxicating liquors; and books purporting to be the records of the club were put in evidence. The government contended that the club was organized to defraud the city of a license fee; and that the books and records were not genuine, were founded in fraud, and were gotten up to cover the illegal acts of the defendant. The judge instructed the jury, as requested by the defendant, that if the club was a *bona fide* club and the liquors owned in common by the members, and the members on receiving liquors gave money in return, it would not be a sale within the meaning of the statute; and that, "if two or more persons unite in buying intoxicating liquor, and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial. If they intend in this manner to obtain intoxicating liquor to drink without thereby subjecting any person to the penalties of the statute, they still act with impunity." The judge further instructed the jury, against the objection of the defendant, as follows: "It is not a violation of law if they unite in good faith in dividing it. If two persons buy a gallon of liquor, and divide it among themselves, they act with impunity; but if this is a mere device to cheat the government out of its license fee, and prevent the due execution of law, it is not a protection, and the defendant does not act with impunity." *Held*, that the defendant had no ground of exception.

COMPLAINT to the Police Court of Springfield, alleging that the defendant, on September 12, 1886, at Springfield, sold intoxicating liquor to a person to the complainant unknown.

At the trial in the Superior Court, on appeal, before *Bacon*, J., it appeared in evidence, that, on the evening of the day named in the complaint, the defendant, in the club-room of the club hereinafter described, delivered lager beer to a man whose name was to the complainant unknown. Two police officers, witnesses for the government, testified that they were by a window on the outside of the building, looking through an aperture between the sash of the window and the curtain, and that they could see a part of the room, and heard the man call for lager beer, and that a man delivered what they supposed was lager beer; that they could not distinguish the faces of those present; and that money was passed by the unknown man in payment of the beer, namely, a quarter of a dollar, and that change to the amount of

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fifteen cents, namely, a ten-cent piece and a five-cent piece, was returned to him.

The defendant introduced evidence tending to show that he was the steward of a club of about four hundred members, organized on May 1, 1886, and acting under its organization ever since; that he received a salary as such steward from the club; that the club had, as officers, a president, treasurer, secretary, and steward, and an executive committee of three; that each member, upon joining the club, paid to the treasurer the sum of one dollar, and received a card certifying his membership; that the money so obtained was used in buying liquors in the name and as the property of the club; that a quantity of checks made of zinc, some of the size of a quarter of a dollar silver piece, representing the value of ten cents, and others about the size of a ten-cent silver piece, of the value of five cents, were furnished to the members of the club asking for them, by the treasurer, or, in his absence, by the steward of the club, in any number required, upon the member paying in money the price of said checks.

The defendant and four other witnesses testified that none but members were admitted to the rooms of the club, and none but members were permitted to partake of the liquors of the club, and this was so on the night in question; and that neither on this night, nor at any time, was money passed in return for liquor or beer, but that the checks above described were given in return for the beer or liquor delivered to the members. The defendant also introduced evidence tending to show that it was the duty of the steward to furnish liquor or beer to the members in return for these checks.

The defendant also introduced evidence tending to show that no one became a member unless his name was proposed and voted on; that an applicant for admission was rejected if three nay ballots were cast against him; that upon joining he signed the constitution and paid a membership fee; and that applicants for membership had been rejected.

Books, purporting to be the records of the club, and containing the constitution, by-laws, minutes of the meetings, signatures of all the members, and the treasurer's accounts, were put in evidence, as were also the above-described checks.

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It was admitted that, at the preceding municipal election in Springfield, it was voted to grant licenses for the sale of intoxicating liquor.

The government contended that the club was organized to defraud the city of Springfield, the county of Hampden, and the Commonwealth of Massachusetts, of the revenue received from licenses for the sale of intoxicating liquor, and that said books and records were not genuine, and were not the evidence of a genuine organization, and were founded in fraud and deceit, and were gotten up to cover up the illegal acts and transactions of the defendant.

The defendant asked the judge to instruct the jury as follows: "1. If this was a *bona fide* club, and the liquors owned in common by the members, and the members on receiving liquor gave in return money instead of checks, it would not constitute a sale within the meaning of the statute. 2. If two or more persons unite in buying intoxicating liquor, and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial. If they intend in this manner to obtain intoxicating liquor to drink without thereby subjecting any person to the penalties of the statute, they still act with impunity."

The judge gave the first instruction requested, and also gave the second, but added this qualification: "It is not a violation of law if they unite in good faith in dividing it. If two persons buy a gallon of liquor, and divide it among themselves, they act with impunity; but if this is a mere device to cheat the government out of its license fee, and prevent the due execution of law, it is not a protection, and the defendant does not act with impunity."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. E. Dunleavy, for the defendant.

E. J. Sherman, Attorney General, for the Commonwealth.

KNOWLTON, J. The contention between the parties upon these exceptions relates solely to the interpretation of the judge's charge. The defendant excepted to the qualification of the last instruction which he had requested. He contends that the jury must have understood the judge as saying, that, if several persons

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buy liquor and divide it among themselves, even though the transaction is real and genuine, and do it with a purpose thereby to obtain their liquor more economically than to buy it of some one who is obliged to pay the government a license fee, and with an additional purpose to deprive in that way the government of a license fee which it would otherwise get, the transaction is unlawful. If that were the meaning of the instruction, it would be clearly wrong. To ascertain its true interpretation, let us revert to the circumstances under which it was given. The defendant had introduced evidence that he was one of a club organized for the distribution of liquor among its members. The Commonwealth contended that the club was organized to defraud the government "of the revenue received from licenses for the sale of intoxicating liquor," and that the books and records put in evidence "were not genuine, and were not the evidence of a genuine organization, and were founded in fraud and deceit, and were gotten up to cover up the illegal acts and transactions of the defendant."

An important, if not the principal, question of the case was whether this was a real and genuine arrangement for the division of liquor among the owners of it, or was a mere pretence and device to cover up unlicensed sales. Very likely this question had been fully discussed by counsel. The presiding judge gave both instructions requested by the defendant. In the first, he told the jury unqualifiedly that the distribution of liquor of a club among its members would not constitute a sale, even though they gave money in return for it. In the second, he told them that the distribution of liquor among themselves by the owners of it was not unlawful, whatever their intention might be. Having stated in their baldest form the propositions relied on by the defendant, upon the theory that the liquor was really distributed among the owners of it, he apparently thought it proper to bring to the attention of the jury the rule applicable to the claim of the Commonwealth, that the division testified to was not real, but a mere sham and pretence, and he gave the qualification objected to, saying, "It is not a violation of law for them if they unite in good faith in dividing it. If two persons buy a gallon of liquor and divide it among themselves, they act with impunity;" — which was equivalent to saying, If it is a real and

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genuine division, and not a mere pretence to cover something else, it is lawful. And then, to state the other alternative, he added, "But if this is a mere device to cheat the government out of its license fee, and prevent the due execution of law, it is not a protection, and the defendant does not act with impunity;" — meaning to say, If the transaction is not real, but is a mere form and device under cover of which to sell intoxicating liquor without a license, and so violate the law, it will not avail the defendant in this prosecution. The words "to cheat the government out of its license fee" can hardly mean anything else than "to sell intoxicating liquor without a license;" for the only license fee to which the government is entitled in connection with the delivery of liquors is for sales, and one cannot be cheated out of that which does not belong to him. In view of the attendant circumstances, we think the language of the instructions, taken together, was intended by the judge to be used, and was understood by the jury, in a sense which correctly represents the law.

*Exceptions overruled.**

ALEXANDER HANDYSIDE *vs.* LEWIS J. POWERS.

Hampden. Sept. 27. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

In an action against the owner of a building for personal injuries occasioned to the plaintiff by a fall down an elevator well in the building, it appeared that the plaintiff, who was a plumber, was employed by A., a tenant of a portion of the building, to do some work therein; that, in the prosecution of his work, he opened a door leading into the well, it being unlighted and without a barrier, and fell, receiving the injuries complained of; that the door to the well had been provided with a lock, had been locked, and the key deposited in the defendant's office; and that this was the only key known by the defendant or his agent to exist, and it was found in its place in the defendant's office after the accident. There was evidence that a key had been procured by A. and used, but without the consent or knowledge of the defendant or his agent; and that the neglect of A. in unlocking the door and in leaving it unlocked caused the accident. The lease to A. gave him a right to the use of the elevator in common with the other tenants. *Held*, that the action could not be maintained.

The Pub. Sts. *c.* 104, § 14, as amended by the St. of 1882, *c.* 208, requiring safeguards to elevator openings, do not make the owner of a building who does not

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* See St. 1887, *c.* 206.

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comply with their provisions liable to a person injured by falling down an elevator well, in the absence of evidence that the act has been accepted by the city in which the building is located.

TORT, against the owner of a building in Springfield, for personal injuries occasioned to the plaintiff by a fall down the elevator well in said building. Trial in the Superior Court, before *Staples*, J., who reported the case for the determination of this court, in substance as follows:

The plaintiff testified as follows: "I am a plumber. On May 12, 1885, I was hired by M. J. King, a tenant of a portion of the building, to do some work therein. I was taken to the top or fourth floor, and was shown the sink and water-closet, and was told that the waste water to the sink and the aqueduct water failed to run. I went to my shop for some tools, and returned in half or three quarters of an hour with my tools. I went up to the third story. I understood that the tenement up stairs (meaning the fourth floor) had been vacant for a long time, and that the water had not run since the people came there. I thought the water must be shut off on the flight below, to keep the water from freezing, and I went there to see if the water was not shut off. This was the third floor. I tried the first door at the head of the stairs and found it locked. I then went to the next door, which was the door of the elevator well. Had my tools on my shoulder done up in a carpet bag; this door was not locked; went in; the room was all dark. I thought this was the water-closet; there was no gas in it; had no idea there was an elevator there. I stepped on the threshold, and the next step I fell. There was no light; I thought there must be a light in some place. It was totally dark; could not see anything. I had never been in this building above the basement before this day. I had no knowledge that there was an elevator in the building."

On cross-examination, the plaintiff testified as follows: "When I came back with my tools, I did not go to the fourth story. I went to find where the stop-cock was. I had not been told anything about the premises on that floor. I did not locate the water-closet on the fourth story to compare it with the water-closet on the third story. Had no light or match with me. I was going to set down my tools and go and get one. I put my foot down, and I thought I was going on to a floor, but I was down too far

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before I could pull it back. I stepped off into total darkness. I felt for a floor with my foot. Some buildings are so constructed that they can shut off the water on the floor below, and it was my opinion that they had shut the water off to keep the pipes from freezing. It was between two and three o'clock in the afternoon when I fell."

The defendant testified as follows: "I am the owner of the building where the accident happened. The basement, the fourth story, and the two front rooms on the third story, were leased to M. J. King."

By the terms of the lease, which was put in evidence, the leased premises were "the basement, the upper story, together with the two front rooms in the third story, of the granite block owned by said Powers, and known as 231 Main Street, in said Springfield." The lease gave "the use, in common with other tenants, of the stairways in said building, and the elevator. Provided, however, said King agrees to take care of and clean said stairways." The lease also contained the following clause: "that he [the lessee] will allow the lessor, his heirs and assigns, and their agents, at seasonable times, to enter upon said premises, and examine the condition thereof and make necessary repairs."

The defendant then testified as follows: "No other tenant than King used the elevator or had authority to use it. I had never given the elevator key on the third story to any one; supposed it was at my office. Had no knowledge that there were two keys to the elevator door on this story. The elevator had never been used on that story, to my knowledge, since the building was built. On this floor, Mr. Hall occupied the two back rooms for sleeping rooms. Mr. King occupied one room, and Mr. Gates the other; they were sleeping rooms. The second story was occupied by R. G. Dun and Company's mercantile agency, and an insurance office in the rear, occupied by Mr. Clarke. The first floor was occupied by J. G. Mackintosh and Company's banking office; the basement was occupied by Mr. King as a saloon. There was no water-piping, or gas-piping, or stop-cock of any kind in the elevator well."

In answer to a question put to him by the court, he said: "Nobody on the first or second floors had anything in their

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leases about the elevator. My cashier, Dwight Holland, had charge of this building. It was his duty to attend to the keys and tenants, and to do all necessary work. The fourth story was used by King for no other purpose than as a tenement to live in. Mr. Hall, who occupied the two back rooms on the third floor, has his residence in Brooklyn; he had charge of the Steam Power Company in the rear of my building, and came up once or twice a month, and when he was here he had the use of those rooms."

The defendant testified, on cross-examination, as follows: "I constructed the elevator at the time the building was built; and, after I left the building, a dummy elevator was put in the large elevator, and to run up through it, by some man who rented the saloon in the basement, before King became my tenant. I do not think I gave any permission. I never objected to it. I frequently went on the premises. The building was entirely occupied by tenants."

Dwight Holland, called by the defendant, testified as follows: "I am the cashier of the defendant; have charge of this building. I knew where the key to the elevator door was at the time of the accident; it was at our office. I have possession of the keys to that building. After King moved out of the upper tenement, I examined all the doors, and found they were all locked. This must have been a year before the accident. I examined the elevator door in question, and found it locked; I never let any person have the key and never had any knowledge of any person having the key to this elevator door, on third floor. Nobody ever went to me for a key to it. There is a water-closet at the top of the stairs; the door of the elevator is around the corner, ten feet from it. The elevator on that story has never been used, so far as I know, since I have been with the defendant; I have been with him eighteen years."

On cross-examination, he testified that, so far as he knew, the elevator had not been in use on the third story since the defendant left the building, and that it was in use on that story at the time the defendant occupied the building. "I knew the key was at the office, because the keys have not been disturbed since. I have since looked for the key to this door, and found it in the box; it was after King told me of the accident; it might have been two weeks after. I took it and went up and locked the

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door. I then put the key back in the box, and left it till a few days ago."

M. J. King, called by the defendant, testified as follows: "I am the person named in the lease. The defendant never gave me any key or anything for the use of the elevator in the third story. I got a key to it from Mr. Hall; cannot tell where he got it. I wanted to use it, and borrowed the key. I used the elevator regularly the winter previous to the accident. I used it the morning of the accident, I think. The defendant had no knowledge of the use of the elevator on the third floor while I was there. I did not know the plaintiff was going on the third floor."

On cross-examination, he testified as follows: "Hall used the elevator occasionally; when he wanted to use it he used to ring the bell, pull the knob on the side of the elevator, and that connected with a bell in my saloon. I got the key of Hall about February. When I got through with it, I gave it back to Hall, and up to February, 1885, one of the rooms on the third story was occupied by the Edison Electric Light Company as an office, and as my tenant."

The defendant, being recalled, testified as follows: "I never gave a key to this elevator door to Hall; I had no knowledge that he had a key to it; never gave him the use of the elevator in any form, and never knew of his using it."

Dwight Holland, recalled, testified as follows: "I never let Hall have the key of the elevator door on this story; never knew of his using it; never knew of but one key to that elevator, and that was in the box in my possession."

The lease to King was made on November 3, 1882, and was in force at the time of the accident. The door to the elevator opened from the hallway and swung on perpendicular hinges, and had no trap-door or self-closing hatch or safety-catch. The only entrance to the fourth story was through the hallway on the third story. On the third story there was a bell knob on the inside of the elevator connecting with a gong in the basement. The elevator was closed in with doors opening into it from each story, and could not be seen from the hallway.

At the close of the evidence, the judge ruled that, upon the evidence, the plaintiff was not entitled to maintain his action, and ordered a verdict for the defendant.

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If the ruling was right, the verdict was to stand; if wrong, the verdict to be set aside, and a new trial granted.

J. B. Carroll, for the plaintiff.

T. M. Brown, for the defendant.

DEVENS, J. Without considering whether the plaintiff was an intruder or a licensee in entering on the premises, we do not find that there was evidence in the case of neglect on the part of the defendant. The door to the elevator had been provided with a lock, had been locked, and the key deposited in the defendant's office. This was the only key known by the defendant or his agent to exist, and it was found in its place in the defendant's office after the accident. There was evidence that a key had been procured by King and used, but without the consent or knowledge of the defendant or his agent, and that the neglect of King in unlocking the door and in leaving it unlocked had been the cause of the injury. But the act of King in obtaining a key without the knowledge of the defendant, and his subsequent carelessness, cannot be attributed to the defendant.

It is the contention of the plaintiff, that the Pub. Sts. *c.* 104, § 14, amended by the St. of 1882, *c.* 208, which requires that hoistways, hatchways, elevators, and well-holes upon every floor of a factory or mercantile or public building shall be protected by good and sufficient trap-doors or self-closing hatches and safety-catches, or such other safeguards as the inspectors of buildings shall direct, rendered it obligatory on the defendant to supply the safety appliances there described, and made him responsible if any injury occurred by a failure so to do. It will not be necessary here to consider what is the construction of this section. It is a part of an act for the inspection of buildings, and for the appointment of building inspectors in such towns or cities as shall accept the act, or certain sections of previous acts. Whether it was ever accepted by the city of Springfield does not appear, nor does it appear that any directions were ever given by building inspectors. The section cited does not have any connection with the question in the case at bar, as presented to us by the report. *Judgment on the verdict.*

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HENRY L. BASSETT *vs.* CONNECTICUT RIVER RAILROAD COMPANY.

Hampden. Sept. 27, 28. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

The Pub. Sts. c. 112, § 214, providing that a railroad corporation shall be responsible in damages to a person whose buildings or other property may be injured by fire communicated by its locomotive engines, do not apply to goods delivered to a railroad corporation as a carrier, and in its custody as a warehouseman, at the time of such a fire.

TORT, under the Pub. Sts. *c.* 112, § 214,* for loss of the plaintiff's goods by fire communicated by a locomotive engine of the defendant. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows:

The defendant owns and operates a railroad in this Commonwealth. On March 30, 1887, the freight depot of the defendant at Chicopee was destroyed by fire. The fire was caused by sparks from the defendant's locomotive engine, which set fire to bales of cotton standing on the platform of said depot.

The fire thus kindled was communicated directly to said building, which was destroyed, with its contents, including the goods of the plaintiff, which consisted of numerous articles of household furniture and clothing for himself and family. The property of the plaintiff had been placed on board the cars at Providence, Rhode Island, where he had formerly lived, for transportation to Chicopee, where he had gone to live. The goods were all properly packed in seventy-seven different packages, and carefully covered, so as to protect them against the ordinary hazards to which such goods are liable. The goods arrived at Chicopee on the defendant's railroad, in due course and time, on Saturday, March 26, and were taken from the

* This section is as follows: "Every railroad corporation and street railway company shall be responsible in damages to a person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf."

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cars on the afternoon of that day by the servants of the defendant, and by them placed in said freight depot, where they remained until the building and the goods were destroyed by the fire, as above stated.

Some time during the day on which the goods arrived at Chicopee, a teamster, not in the employ of the defendant corporation, nor under the direction or control of its agent at Chicopee, nor at the request or suggestion of such agent, told the plaintiff that some goods had arrived at said depot, which were directed to the plaintiff, and solicited the job of carrying the goods whenever the plaintiff was ready to have them removed. The plaintiff had no other information of the arrival of the goods, and was not asked or notified to remove the same.

All these goods were shipped and arrived at one time, and the plaintiff had no other goods in course of transportation for Chicopee.

L. White, for the plaintiff.

G. Wells, (*G. M. Stearns* with him,) for the defendant.

KNOWLTON, J. The plaintiff lost his goods by fire in the defendant's freight-house, and he seeks to recover their value under the Pub. Sts. *c.* 112, § 214. The statute invoked is remedial, and has been liberally construed in favor of those for whose benefit it was enacted. The decisions indicate that it applies to property of every kind, and in any place where fire may be communicated by a locomotive engine. *Hart* v. *Western Railroad*, 13 Met. 99. *Lyman* v. *Boston & Worcester Railroad*, 4 Cush. 288. *Trask* v. *Hartford & New Haven Railroad*, 16 Gray, 71. *Ross* v. *Boston & Worcester Railroad*, 6 Allen, 87. *Quigley* v. *Stockbridge & Pittsfield Railroad*, 8 Allen, 438. But it has never been held that it includes within its provisions articles placed in the possession of a railroad corporation by their owner under a contract which fully covers the rights and liabilities of both parties regarding them. When parties see fit to stipulate what their relations shall be touching any matter, their stipulations fix their rights and liabilities, and exclude what is not fairly included in them. The statute referred to gives protection to owners of property who have made no arrangement with the railroad corporation about it. It was not intended to prevent the making of contracts by property owners with railroad

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corporations, determining their respective rights and duties in relation to particular property, or to apply to cases where such contracts have been made. Nor is there any difference in this regard between express and implied contracts. If a railroad corporation and an owner of land or personal property make an arrangement about it from which the law implies a contract broad enough to cover the subject of liability for loss or injury, this contract, implied from their voluntary act, fixes their rights, and excludes the provisions of a statute intended for cases not covered by a contract.

The plaintiff had employed the defendant as a common carrier to transport his goods to Chicopee. He voluntarily entered into an arrangement which involved the subject of the defendant's liability for loss of the property, or injury to it from any cause, and which determined his rights as definitely, under the contract implied by law, as if the parties had written out and signed stipulations in detail. The defendant was bound to carry the goods, and was an insurer of them until the transit ended, and was then liable as a warehouseman for any want of ordinary care during such reasonable time as they should remain in its custody awaiting the call of the consignee. This was the extent of its liability. In the language of Chief Justice Shaw, such an arrangement "we consider to be one entire contract for hire; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company, as a compensation for the whole service, is paid as well for the temporary storage, as for the carriage." *Norway Plains Co.* v. *Boston & Maine Railroad*, 1 Gray, 263, 272. The goods having been destroyed while in the possession of the defendant under this contract, the plaintiff must seek his remedy under it, and the statute referred to does not apply. *Judgment affirmed.*

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SAMUEL BLAISDELL, JR. & others *vs.* CONNECTICUT RIVER RAILROAD COMPANY.

Hampden. Sept. 28. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

If goods, which have been transported over a railroad, and have been received by the owner and placed in a storehouse, occupied exclusively by him and owned by the corporation, adjoining its freight depot at a station, and other goods therein intended for transportation, but not having been delivered to the corporation, are destroyed by fire communicated by its locomotive engine, the owner may maintain an action against the corporation, under the Pub. Sts. *c.* 112, § 214, for the loss of the goods.

TORT, under the Pub. Sts. *c.* 112, § 214, for loss of the plaintiffs' goods by fire communicated by a locomotive engine of the defendant. The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

G. D. Robinson, for the plaintiffs.

G. Wells, (*G. M. Stearns* with him,) for the defendant.

KNOWLTON, J. For the reasons set forth in *Bassett* v. *Connecticut River Railroad*, *ante*, 129, a railroad corporation is not liable under the Pub. Sts. *c.* 112, § 214, for goods destroyed by fire while in its possession under a contract for carriage. The question in this case is whether the plaintiffs' property, at the time of the fire, was in the defendant's possession under such a contract.

The plaintiffs were large shippers of merchandise over the defendant's road, and the defendant built for their use, as an addition to its depot, a storehouse separated from the general freight-house by a brick wall. This the plaintiffs had occupied for two years in connection with their business, and, up to October 1, 1886, they had paid an agreed price per month for it. It can hardly be contended that, during this period, they were not the defendant's tenants, and in exclusive possession and control of all that the storehouse contained.

On September 21, 1886, they notified the defendant that, by reason of the completion of a new building elsewhere, they should not need the storehouse after October 1. On November 1 following, the station agent at Chicopee presented them a bill

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for the rent of the premises for the month of October, which had been sent him for collection by the defendant's auditor, in accordance with a usual practice, and without special directions from the president or superintendent regarding it. The plaintiffs declined to pay it, referring to their previous notification, and no bill was afterwards sent. The station agent informed the superintendent by letter of their refusal, and of their saying that "they would pay no more rent for the storehouse, thinking they should have it free now and would keep the cars cleaned out." He also inquired if there was any error in sending the bill, and asked the superintendent to advise the plaintiffs of the company's position. No reply was sent to the agent, nor communication to the plaintiffs, and they continued until the time of the fire, in March, 1887, "to use and occupy the storehouse in the same manner and for the same purposes as before, which use was known by the station agent, but the agent did not know whether or not any arrangement had been made with the president or superintendent for such use, but such use was without any objection on the defendant's part, and no other persons used the storehouse." The property destroyed "had been received by the plaintiffs in the course of their said business by or for transportation."

Upon these facts, the plaintiffs were in possession and control of the property in the storehouse, as well after as before October 1, 1886. The goods which had come over the defendant's road had been "received" by the plaintiffs and kept in the storehouse, some of them a day or two at the time of the fire, and some of them for months. There is nothing to indicate that the contract under which the defendant carried them had not been fully performed, and, so far as appears, the defendant did not seek to retain a lien upon them, but allowed the plaintiffs to take them into their absolute control; and the facts do not find that the goods in the storehouse "received by the plaintiffs" for transportation had ever been delivered to the defendant so that the parties had come into relations of contract regarding them. The defendant did not use the storehouse, nor have the custody of anything in it. It is quite immaterial whether the relation of landlord and tenant continued to exist between the parties, or whether the plaintiffs, after receiving

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freight which had been transported over the defendant's railroad left in one of the defendant's buildings by sufferance. The next question is as to the goods which had been transported over the railroad, whether they had been given up to the owner so that the contract for carriage, and incidentally for storage for a reasonable time or until delivery, no longer applied to them, and as to those which were intended for transportation, whether they had been delivered to the corporation so that the [illegible] had taken effect.

If so contributory by the defendant, contributory negligence of the plaintiffs would bar their recovery, which we do not decide, but [illegible] their opinion in case of one.

The [illegible] having been destroyed by fire communicated by a [illegible] engine of the defendant, and not having been at the time in the possession of the defendant under a contract fixing the rights and liabilities of the parties regarding it, the plaintiffs [illegible] the value of it, and the entry must be,

Judgment affirmed.

[illegible] v. [illegible] Odd Fellows' Mutual Relief Association & another.

[illegible] Suffolk. — [illegible] 28, 1887. C. Allen & Holmes, JJ., absent.

[illegible] association was organized under the Pub. Sts. c. 115, §§ 2, 8, for the [illegible] of the sickness and burial of its members, [illegible] to the families of deceased members or to their [illegible] of the association provided, that, after payment of the [illegible] and of the last sickness, the balance should be paid to [illegible] the member in his application for membership [illegible] such person was an heir or member of the [illegible] of the persons designated should die, the sum [illegible] that if he had lived should be paid to the [illegible] for the use of herself and her minor children. A [illegible] designated his wife as his beneficiary. [illegible] this, and he, after this, changed [illegible] the latter not being a [illegible] that the [illegible] designation; that the [illegible] and that the sum was [illegible]

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A member of a beneficiary association organized under the Pub. Sts. *c.* 115, §§ 2, 8, had certificates in two classes, each for $1000. Before his death he designated his minor son as his beneficiary to the amount of $500, and his sister as his beneficiary to the amount of $1500. The latter designation was in fact invalid. On his death, the guardian of the son told the president of the association that he thought the son was entitled to $2000. The president did not dispute that the son was entitled to $500, but claimed the balance as belonging to the sister. The guardian yielded to this claim, believing it to be well founded, and received $500, understanding that the association was about to pay $1500 to the sister, and signed a receipt, acknowledging that the $500 was received in full of all demands or claims against the association. The association then paid the $1500 to the sister. *Held*, on a bill in equity brought by the son against the association to recover the $1500, that, if the receipt could be construed as an agreement not to claim the $1500, there was no consideration for it. *Held, also*, that the son was not estopped to maintain the bill by the conduct of his guardian.

BILL IN EQUITY, filed March 25, 1887, by Eckford W. Tyler, a minor, who appeared by his guardian, Reuben Waterman, against the Odd Fellows' Mutual Relief Association and Ruetta A. Massure, to compel the defendant association to pay to the plaintiff the sum of $1500. The case was heard in the Superior Court, by *Dewey*, J., and reserved for the consideration of this court. The facts appear in the opinion.

A. M. Copeland, for the plaintiff.

E. H. Lathrop, for the Odd Fellows' Relief Association.

D. E. Webster, for Massure.

KNOWLTON, J. Before July 16, 1880, L. E. Tyler, the plaintiff's father, had become a member of classes A and C of the defendant association, and had designated his wife, Etta A. Tyler, now Ruetta A. Massure, one of the defendants, as his beneficiary in class A, and his son, the plaintiff, as his beneficiary in class C, and thereby each of said beneficiaries became entitled, under the association's incorporation and its by-laws, to receive, after his death, the sum of $1000.

On February 4, 1885, his wife obtained a divorce from him for his fault, and the question in the case is whether she thereby lost her right to the money. The defendant corporation was organized under the statute for the purpose of defraying the expenses of the sickness and burial of its deceased members, and of rendering pecuniary aid to the families of deceased members or their heirs." The by-laws of the association provide that the amount of the fund shall be paid to the funeral and other expenses, and the balance to the

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freight which had been transported over the defendant's railroad, left it in one of the defendant's buildings by sufferance. The test question is, as to the goods which had been transported over the railroad, whether they had been given up to the owner so that the contract for carriage, and incidentally for storage for a reasonable time or until delivery, no longer applied to them, and, as to those which were intended for transportation, whether they had been delivered to the corporation so that the contemplated contract had taken effect.

If, as contended by the defendant, contributory negligence of the plaintiffs would bar their recovery, which we do not decide, we find in their conduct no want of due care.

The property having been destroyed by fire communicated by a locomotive engine of the defendant, and not having been at the time in the possession of the defendant under a contract fixing the rights and liabilities of the parties regarding it, the plaintiffs may recover the value of it, and the entry must be,

Judgment affirmed.

Eckford W. Tyler *vs.* Odd Fellows' Mutual Relief Association & another.

Hampden. Sept. 28. — Oct. 20, 1887. C. Allen & Holmes, JJ., absent.

A beneficiary association was organized under the Pub. Sts. c. 115, §§ 2, 8, for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of deceased members or to their heirs. The by-laws of the association provided, that, after payment of the expenses of the funeral and of the last sickness, the balance should be paid to the person designated by the member in his application for membership, or last legal assignment, provided such person was an heir or member of the decedent's family, and, if either of the persons designated should die, the sum which would have been payable to him if he had lived should be paid to the widow of the designator for the use of herself and her minor children. A member of the association designated his wife as his beneficiary. She afterwards obtained a divorce from him, and he, after this, changed the designation to his son and to his married sister, the latter not being a member of his family and not dependent on him for support. *Held*, that the wife, by obtaining a divorce, lost her rights under the designation; that the attempted designation to the sister was invalid; and that the son was entitled to the fund.

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A member of a beneficiary association organized under the Pub. Sts. c. 115, §§ 2, 8, had certificates in two classes, each for $1000. Before his death he designated his minor son as his beneficiary to the amount of $500, and his sister as his beneficiary to the amount of $1500. The latter designation was in fact invalid. On his death, the guardian of the son told the president of the association that he thought the son was entitled to $2000. The president did not dispute that the son was entitled to $500, but claimed the balance as belonging to the sister. The guardian yielded to this claim, believing it to be well founded, and received $500, understanding that the association was about to pay $1500 to the sister, and signed a receipt, acknowledging that the $500 was received in full of all demands or claims against the association. The association then paid the $1500 to the sister. *Held*, on a bill in equity brought by the son against the association to recover the $1500, that, if the receipt could be construed as an agreement not to claim the $1500, there was no consideration for it. *Held, also*, that the son was not estopped to maintain the bill by the conduct of his guardian.

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A. M. Copeland, for the plaintiff.

E. H. Lathrop, for the Odd Fellows' Relief Association.

D. E. Webster, for Massure.

KNOWLTON, J. Before July 16, 1880, L. E. Tyler, the plaintiff's father, had become a member of classes A and C of the defendant association, and had designated his wife, Etta A. Tyler, now Ruetta A. Massure, one of the defendants, as his beneficiary in class A, and his son, the plaintiff, as his beneficiary in class C, and thereby each of said beneficiaries became entitled, under the association's incorporation and its by-laws, to receive, after his death, the sum of $1000.

On February 4, 1885, his wife obtained a divorce from him for his fault, and the first question in the case is whether she thereby lost her rights as his beneficiary. The defendant corporation was organized under an agreement of association "for the purpose of defraying the expenses of the sickness and burial of its deceased members, and rendering pecuniary aid to the families of deceased members, or their heirs." The by-laws of the association provide that, after payment of the expenses of the funeral and of the last sickness, "the balance shall be paid to the

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person or persons designated by the member in his application for membership, or last legal assignment, provided such person or persons are heirs or members of the decedent's family;" also that, "if either of the persons so designated have died, the sum which would have been paid to said decedent's assignee, had he been living at the time of the member's death, shall be payable to the widow of the designator, for the use of herself and his minor children, if any, or, if he leave no widow, it shall be payable to a guardian or trustee appointed for said children;" and that "if the designator leave no widow, or children, or assignee, then it shall be payable to his heirs."

The principal object of the association manifestly is, as its members die from time to time, to provide for those nearest to them whom they leave behind. Each of the several expressions touching the persons to whom the moneys are to be finally paid, has reference to the relation of such persons to the member at the time of his death. The language in the agreement of association, "to the families of deceased members, or their heirs," the proviso limiting payments upon designations to "heirs or members of the decedent's family," and the word "widow" in the next clause, are inconsistent with any other interpretation. Assuming then, but not deciding, that the validity of a designation is to be determined at the outset, with reference to the relation then existing between the member and his beneficiary, we think, to make it available after his death, there must then be a relation to the deceased such as is contemplated by the agreement of association and the by-laws relating to payment; and this view is strengthened by a consideration of the statute under which the association was organized. Pub. Sts. *c.* 115, §§ 2, 8. *Elsey* v. *Odd Fellows' Relief Association*, 142 Mass. 224.

At the time of the death of L. E. Tyler, his former wife, Etta A. Tyler, was not a member of his family nor one of his heirs, but her connection with him had been severed by the divorce. We therefore think she had lost her rights under the designation of her former husband, and was not entitled to anything from the defendant association after his death.

On June 10, 1885, L. E. Tyler attempted to change the designation in class A from Etta A. Tyler to Emily J. Cook, his sister, and in class C from his son to his son and his said sister, each

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one half. The attempted designations to his sister, who was neither a member of his family nor dependent upon him, were invalid for the reasons set forth in *Elsey* v. *Odd Fellows' Relief Association*, *ubi supra*.

The plaintiff, being his only son and heir at law, was entitled, either in that relation or as his designated beneficiary, to the entire fund in each class, and it becomes unnecessary to consider whether any of the attempted changes in designation were sufficiently approved by the defendant corporation.

But the defendant contends that the plaintiff's right to recover the balance has been barred by the acts of his guardian. This claim suggests two questions: Is the plaintiff concluded by a written contract? Is he barred by an estoppel *in pais*? His guardian, Reuben Waterman, acting under an appointment in Connecticut, had an interview with the president of the defendant corporation, in which he informed him that he thought the plaintiff was entitled to $2000. The president did not dispute that he was entitled to $500, but claimed the balance as belonging to Emily Jane Cook. It is fairly to be inferred from the report, that Waterman yielded readily to said claim, believing it to be well founded. There is nothing to indicate that he made any further assertion of his right, or that there was any controversy between the parties. Thereupon he was paid $500, and he signed, as guardian, a receipt for said sum containing these words: "which I hereby acknowledge to be in full of all demands or claims against said association which I now hold or to which I may be entitled as the assignee of L. E. Tyler, now deceased, and who was a member in class C in said association at the time of his death." Without considering whether a Connecticut guardian could bind his ward by a contract relating to property here, and assuming this to be in form a contract, and not a mere admission, we are of opinion that there was no consideration for an agreement not to claim the balance of the $2000 to which the plaintiff was entitled. It is well settled that the payment of a part for the whole of an ascertained and liquidated debt is not a sufficient consideration to support a promise to accept it as a full payment and satisfaction. *Harriman* v. *Harriman*, 12 Gray, 341. *Perkins* v. *Lockwood*, 100 Mass. 249. *Curran* v. *Rummell*, 118 Mass. 482. Where a controversy is compromised,

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or where the claim is for unliquidated damages, and the parties fix a sum which one agrees to pay and the other to receive as a final settlement of what was before undetermined, the rule is different. In such a case, the agreement of each is a good consideration for that of the other.

The writing in this case was apparently made under a mistake. The parties evidently supposed that the attempted designations of said Cook were valid, and that the plaintiff had no right to anything from class A. The word "assignee" relates to his connection by designation, and the description of the claim refers to class C. alone. In any event, therefore, the writing can only apply to the claim under the certificate in class C, and for the reasons above stated we think it cannot prevent the plaintiff's recovering the unpaid balance under that.

It remains to inquire whether the plaintiff is estopped by the conduct of his guardian from maintaining this bill. It appears that, when Waterman received the $500, he understood that the defendant association would pay the remaining $1500 to Mrs. Cook, and he made no objection thereto. An estoppel results from conduct which was intended to induce, and has induced, another to act to his disadvantage. It can only come from a successful effort to get one to change his situation. *Plumer* v. *Lord*, 9 Allen, 455. *Andrews* v. *Lyons*, 11 Allen, 349. *Turner* v. *Coffin*, 12 Allen, 401. *Carroll* v. *Manchester & Lawrence Railroad*, 111 Mass. 1. The act of the association by which its situation was changed to its detriment, and which is relied on as a foundation for an estoppel, was the payment of $1500 to Emily Jane Cook. It does not appear that Waterman had a wilful design to induce this act. On the other hand, the corporation seems to have proposed, and Waterman to have merely accepted, the payment to himself. It prepared a writing and sent it to him for his signature. He signed and returned it, and the draft was then sent him by mail. He passively assented to the arrangement which the corporation suggested. There is nothing to indicate that he received the plaintiff's money, and signed the receipt, with a view thereby to induce the making of a payment to said Cook. He seems rather to have understood that the corporation had decided for itself its action with reference to her, as well as to himself, and to have had no purpose

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beyond getting what he supposed belonged to his ward. If the plaintiff could have been estopped by conduct of his guardian in a transaction of this kind outside of the State of his appointment, which we do not intimate, an essential element of estoppel was wanting, and this defence cannot prevail.

The divorce having deprived the defendant Massure of her interest in the fund, and the designations to the defendant Cook being invalid, and nothing having occurred to bar a recovery by the plaintiff of the balance of the money belonging to him, there must be a decree in his favor against the defendant corporation for the sum of $1500, and interest; and as to the defendant Massure the bill may be dismissed. *Decree accordingly.*

MOUNT HERMON BOYS' SCHOOL *vs.* INHABITANTS OF GILL.

Franklin. Sept. 29. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

An institution organized under the Pub. Sts. *c.* 115, for the education of boys, owned a large farm, on which were the school buildings, two farm-houses, barns, and other buildings adapted for farm purposes, and live stock. The scholars, in addition to attending school, were required to work on the farm two or three hours a day, and were taught agriculture. The price of board and tuition was $100 a year for each scholar. The products of the farm and the live stock were for the most part consumed in furnishing food for the scholars, but others were sold or bartered and the proceeds applied to the maintenance of the school. *Held*, that, under the Pub. Sts. *c.* 11, § 5, *cl.* 3, the whole of the property of the institution was exempt from taxation.

CONTRACT, in two counts. The first count was to recover $175.26, the amount of a tax assessed upon the real estate and personal property of the plaintiff on May 1, 1884, and paid under protest. The second count was to recover $179.79, the amount of a similar tax assessed on May 1, 1885, and also paid under protest. Answer, a general denial.

Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found the following facts:

The plaintiff is an institution organized, under the Pub. Sts. *c.* 115, on May 19, 1882, for the "education of boys," and its

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property consists of a farm of about four hundred acres, situate in the town of Gill, upon which are two farm-houses, barns, and other buildings adapted to farming purposes, cottages for lodgings, a building styled a recitation-hall, containing a chapel, school-rooms, library, and museum, and a building styled Crosby Hall, containing rooms for about two hundred students, and a dining-hall for the whole school. Of live stock, the property of the plaintiff, there were on the said farm oxen, horses, and swine, bred, reared, kept, and used on said farm; and all of said farm, excepting about ten acres, upon which are said school buildings and their near surroundings, and woodland, is used for tillage, pasture, and other agricultural purposes. Said corporation has no capital stock or stockholders, and has obtained its property by means of gifts of money from persons interested in the objects of the school, and such property is held and managed by fifteen persons, styled trustees, one of whom is president. There are also a vice-president, a secretary, and a treasurer. A superintendent of said farm and school, and from ten to fifteen teachers, reside on the farm.

The purpose of the school is to provide a place where young men whose early education has been neglected can be instructed, their physical welfare cared for, and a practical knowledge of work, especially in agriculture, given, by requiring of each member of the school a certain amount, usually two or three hours per day, of manual labor on said farm. The aim of the industrial arrangements is not so much to secure pecuniary benefit as to provide for physical culture, teach how to do various kinds of farm work, form habits of industry, and inculcate right views of manual labor, and especially of agriculture. No person under the age of sixteen years, or not having health, mental ability, and moral character, can be admitted into said school. Boys admitted into the school are required to pay for board and tuition, each $100 per year, payable semiannually in advance. During vacations, the scholars may have occasional employment on said farm for wages, and during terms may also do extra work, for which they are paid. The maintenance of the school depends upon the moneys received from the board and tuition of its scholars, and the products of the farm. The farm is carried on substantially by the labor of the scholars of the

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school; and the products of the farm, excepting as hereinafter stated, are consumed in the school, for food of its scholars, fuel, &c. The products of the farm have been hay, corn, rye, potatoes and other vegetables, and butter and milk. The school went into operation in 1881, and has been maintained and carried on since in accordance with the purposes of its organization, as the same are herein stated.

Between May 1, 1884, and March 12, 1885, inclusive, there were sold for cash, or exchanged in barter, at current market prices, for other farm products and provisions, products and live stock of the farm to the amount and value of $1047.57, as follows: pork and live hogs, partly for cash and partly in exchange for beef, $180.47; five fat cows, not yielding milk, for cash, $160; two cows and their two calves, of imported Angus stock, on credit, of the value of $400; apples, for cash, $124.55; cucumbers, for cash, $26.30; butter, for cash, $11.75; calves, for cash, $9; calf-skins, for cash, $3.50; in barter with a girls' school at Northfield, for various farm products, $150. Cows and calves thus sold were part of the live stock kept and bred on the plaintiff's farm, and fed on its products. Of the hogs and pork thus sold on the farm, the hogs were bred, kept, and fed there upon its products, and upon swill derived from the boarding-house of the plaintiff, and were tended by the scholars. The butter and milk thus sold were the products of the cows kept on the farm and the labor of the scholars. The cucumbers and apples thus sold were also the product of the farm and the labor thereon of the scholars.

There is at Northfield, four miles from the plaintiff's school, a girls' school, to which is attached a farm, the products of which during the years 1884 and 1885 were interchanged with the products of the plaintiff's farm, at current market prices, for the mutual convenience of the two schools; and in this interchange the plaintiff furnished to the girls' school its farm products of the value of $150, and received from said girls' school its farm products of much larger amount and value, so that the balance of accounts arising out of such interchange of products was, in settlement of such accounts, always largely in favor of said girls' school. In the summer of 1885, there was a convocation of clergymen and religious persons, for religious objects,

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which continued during two weeks, on the premises of said girls' school; and for milk from the plaintiff's cows on its farm, furnished to said convocation, the plaintiff received in cash the sum of $72.80.

All the products and live stock of the plaintiff's farm disposed of by sale and barter were cultivated, gathered, and tended by the labor of the plaintiff's scholars; and all moneys received from their sale came to the hands of the plaintiff's treasurer, and were applied to the maintenance of the plaintiff's school. All farm products and provisions obtained by the barter of the plaintiff's farm products were consumed in the plaintiff's school, for the subsistence of its scholars or of the live stock on the plaintiff's farm. From the time when the plaintiff's school went into operation, the products of its farm have largely increased from year to year, but have never been sufficient for the needs of the school, or of the stock on the farm.

The assessors of the defendant town, in 1884, assessed taxes upon the plaintiff's personal property, consisting of the horses, oxen, cows, and swine on said farm, valued at $2934, in the sum of $34.62, and upon the plaintiff's real estate, consisting of three hundred and twenty-three acres of the land of the said farm, and the two farm-houses, wood-house, two barns, two sheds, two tobacco barns, and milk-house, valued at $11,755, in the sum of $138.70. The defendant's bill for these taxes, amounting to $175.26, was paid to the defendant's tax collector by the plaintiff's treasurer, on February 27, 1885, after due demand, but under protest, in writing, that said taxes had been illegally assessed.

The assessors of the defendant town, in 1885, assessed taxes upon the same personal property on the plaintiff's farm, valued at $2517, in the sum of $31.69, and upon the same real estate and buildings, valued at $11,755, in the sum of $148.10, and these taxes of 1885, amounting in all to $179.79, were duly demanded by the defendant's tax collector of the plaintiff's treasurer, who paid the same, with a written protest that the same were illegally assessed. No question was made as to the sufficiency of said demands and protests.

In 1884 and in 1885, the defendant assessed no taxes on any of plaintiff's buildings on its said farm having in them rooms

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used for school purposes, or for dormitories for scholars, or for eating-rooms, or for recitation-rooms, or for lodging of teachers, or on the superintendent's house, the chapel, or the library.

In 1884, the defendant owed a debt of $10,000, contracted prior to 1882 in contributing to the cost of erecting a bridge over the Connecticut River, and duly raised money by taxation in 1884, including the taxes in suit, to pay interest on said debt. The defendant at the town meeting in March, 1885, duly voted to pay and to appropriate money raised by taxation, and to pay $1000 of said debt of $10,000, and duly raised money by such taxation in 1885, including the taxes in suit.

Upon these facts the judge ruled that the action could not be maintained, and ordered judgment for the defendant. The plaintiff alleged exceptions.

C. C. Conant, for the plaintiff.

J. A. Aiken, for the defendant. 1. If any portion of the plaintiff's real estate or personal property was liable to taxation, this action cannot be maintained. The proper remedy is an application for an abatement. Pub. Sts. *c.* 11, § 69. *Bourne* v. *Boston*, 2 Gray, 494, 496. *Chapel of the Good Shepherd* v. *Boston*, 120 Mass. 212.

It certainly requires a very liberal interpretation of the statute to hold that the two tobacco barns, a part of the property for which the plaintiff claims exemption, are property appropriate for a literary, educational, charitable, scientific, or religious institution. No taxes were assessed in 1884 or 1885 upon buildings having in them rooms used for school purposes, or for dormitories for scholars, or for eating-rooms, or for lodging of teachers, or on the superintendent's house, the chapel, or the library. The defendant seeks to hold subject to taxation only the farm and farming stock.

2. It appears in the exceptions that the defendant town, prior to the incorporation of the plaintiff, had contracted a debt in contributing to the cost of erecting a bridge over the Connecticut River; that this debt was still outstanding in 1884 and 1885; and that a portion of the taxes assessed upon the plaintiff's property, and in suit in this action, was to raise money to pay the interest upon the debt in 1884, and a part of the principal in 1885. The real estate of every inhabitant of Gill was security

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for the payment of the debt, and might have been taken upon an execution on a judgment against the town on account of this debt. *Hill* v. *Boston*, 122 Mass. 344, 349. Until this debt is paid, the real estate of the plaintiff is a part of the security holden for the town's liability, and it should bear its proportion of the money raised by taxation on account of that debt.

3. The plaintiff claims exemption from taxation under the Pub. Sts. *c.* 11, § 5, *cl.* 3. It is not entitled to avail itself of that exemption, because its property has not been occupied for the purposes for which it was organized, and because a portion of its estate has been used for other than literary, educational, benevolent, charitable, scientific, or religious purposes.

The plaintiff, during a period extending from May 1, 1884, into the summer of 1885, disposed of various products of the farm and of the farming stock, by way of sale and barter, at current market prices, to the amount of more than $1100. It is immaterial whether these products were sold, bartered, or exchanged. At law the nature and effect of the transaction are the same. *Commonwealth* v. *Clark*, 14 Gray, 367, 372. Neither can it make any difference that the other parties to the transfer were in some of the instances a girls' school of similar objects and systems, and clergymen and religious persons.

A statute which exempts property from taxation is to be strictly construed. Taxation is the rule, exemption the exception. Such special privileges are in conflict with the universal obligation of all to contribute a just proportion toward the public burden. The burden of proof is upon every person who claims exemption, to show that his case comes clearly within the exception. If any doubt arises as to the exemption, it must operate most strongly against the party claiming the exception. *Redemptorist Fathers* v. *Boston*, 129 Mass. 178.

The plaintiff, besides being a literary, benevolent, charitable, scientific, or religious institution, has been a seller of farm produce for gain. That the sales have been small is no defence; the question is not one of degree. If the plaintiff may dispose of farm produce, at current market rates, to the amount of more than $1000 during the years in question, why may it not, when the farm's productiveness is increased, dispose of $10,000 worth, or of $100,000 worth, in the same way, provided the proceeds are

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used for the benefit of the school? Why, also, may it not, in furtherance of its project of furnishing an industrial education, establish, in addition to its farm, a woollen mill to clothe its pupils with wool grown upon the farm, and a shoe shop to shoe them with hides there produced, and sell the surplus products of such manufactories, and, using the proceeds for the maintenance of its school, contend that such appropriation is for literary, educational, benevolent, charitable, scientific, or religious purposes, and so the plaintiff is exempt? The statute never intended such proceedings, yet such will be the inevitable result, if the plaintiff is allowed to prevail in this action.

The plaintiff will urge that many of the products of its farm are of a perishable nature, like butter, milk, eggs, and apples, and some of them of a nature unavailable for school purposes, as the hides of animals, and that the only way for the school to utilize such products is to sell them or trade them off. The answer to this position is, that, if the plaintiff chooses in the management of its school to have an annex, like a farm, which obliges it to enter the market as a seller of goods, the plaintiff must bear the same burdens that other sellers bear, namely, pay taxes. The plaintiff is not obliged to maintain its farm.

In *Wesleyan Academy* v. *Wilbraham*, 99 Mass. 599, Chief Justice Chapman recognizes distinctly that the plaintiff's property would not have been exempt "if the plaintiffs carried on their farm and sold the produce at its market price for the use of the students, in order to make a profit as farmers or dealers in milk and vegetables."

The plaintiff must take the position, that, because the things or the money received in exchange for the plaintiff's produce were ultimately applied to the maintenance of the plaintiff's school, there is a compliance with the spirit of the statute. Such a view cannot be maintained. *Lowell Meeting-House* v. *Lowell*, 1 Met. 538. *Pierce* v. *Cambridge*, 2 Cush. 611. *Chapel of the Good Shepherd* v. *Boston*, *ubi supra*. *Lynn Workingmen's Association* v. *Lynn*, 136 Mass. 283.

The plaintiff, being a corporation organized for the "education of boys," is authorized to make such purchases as are necessary, but it cannot be a seller or trader of farm produce. If it chooses to put produce upon the market, it should pay taxes. To hold

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otherwise is to give a bounty or subsidy to the plaintiff, enabling it to undersell neighboring producers among the inhabitants of the defendant town, whose burdens are thereby augmented by having to bear the increased taxation and competition.

KNOWLTON, J. The defendant very properly conceded, at the argument, that the plaintiff was one of the institutions to which certain exemptions from taxation were granted by the Pub. Sts. *c.* 11, § 5, *cl.* 3. The first question under this clause is whether the plaintiff's real estate which was taxed was occupied for the purpose for which the plaintiff was incorporated; and, inasmuch as the incorporation was under the general law, the second question is, under the last part of said clause, whether any portion of the taxed property, real or personal, was "used or appropriated" at the time of taxation "for other than literary, educational, benevolent, charitable, or religious purposes."

The purpose of the plaintiff's incorporation was the "education of boys." Education is a broad and comprehensive term. It has been defined as "the process of developing and training the powers and capabilities of human beings." To educate, according to one of Webster's definitions, is "to prepare and fit for any calling or business, or for activity and usefulness in life." Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all. The plaintiff's trustees did not exceed their authority under their certificate of incorporation when they established an institution one of whose purposes was, according to the facts found, "to provide a place where young men, whose early education has been neglected, can be instructed, their physical welfare cared for, and a practical knowledge of work, especially in agriculture, given, by requiring of each member of the school a certain amount, usually two or three hours per day, of manual labor on said farm." It appears further in the facts, that "the aim of the industrial arrangements is not so much to secure pecuniary benefit as to provide for physical culture, teach how to do various kinds of farm work, form habits of industry, and inculcate right views of manual labor, and especially of agriculture."

The plaintiff's farm consists of about four hundred acres of land, upon which, besides the buildings containing the chapel,

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school-rooms, library, museum, cottages for lodging, general dormitory for two hundred pupils, and dining-hall, there are two farm-houses, barns, and other buildings adapted to farm purposes. The farm was used for tillage, pasture, and other agricultural purposes, and "oxen, horses, and swine were bred, reared, kept, and used on it." "No person under the age of sixteen years, or not having health, mental ability, and moral character, can be admitted into the school." The farm was mainly carried on by the labor of the scholars of the school, and the products of the farm were for the most part consumed in said school. The animals kept on the farm were tended by the plaintiff's scholars. During the year following May 1, 1884, products and live stock of the farm were sold for cash, or exchanged in barter at current market rates, amounting in value to $1047.57. These appear to have been articles not desired for consumption. Of this amount $400 was received for two cows of imported stock and their two calves. Pork and hogs were exchanged in part for beef, and there were other products incidental to the management of the farm, some of them perishable, which apparently were not needed for use in the school.

The use of the farm and of the personal property upon it resulted beneficially to the plaintiff in three different ways. First, it furnished for the scholars the field, objects, and materials necessary for their physical training and practical study of agriculture, in connection with manual labor and the general development referred to in the above-quoted statement of the purposes and aims of the school. Secondly, it provided food for the pupils and teachers who were in attendance, and contributed directly to the economical support of the scholars, which was an important object of the institution. Thirdly, so far as the products of the farm were sold, the plaintiff presumably obtained profit, and to that extent replenished its treasury. The use of the property to accomplish either of the first two results would be for the purpose for which the corporation was formed, within the meaning of the statute we are considering, and would leave the whole exempt from taxation; the use of it to accomplish the last would not.

To an institution of learning attempting to furnish practical education in agriculture, and to give boys physical development

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by manual labor, a farm is as necessary as are chemicals and chemical apparatus to a teacher of chemistry. And a farm cannot be managed without the personal property properly appertaining to it. So, too, in connection with a boarding-school situated as this was, the corporation's use of the farm to raise provisions for its scholars is to be distinguished from the use of it to increase the funds in its treasury, and thereby enable it to do its charitable work. This distinction is well marked in *Wesleyan Academy* v. *Wilbraham*, 99 Mass. 599, and in *Chapel of the Good Shepherd* v. *Boston*, 120 Mass. 212. See also *Monticello Female Seminary* v. *People*, 106 Ill. 398.

The purpose referred to in the statute contemplates the direct and immediate result of the use of the property, and not the consequential benefit to be derived from the improvement of it. Where one of the objects of an institution of learning is charitable, and boys are required to pay only a part of the cost of their education, — as, in this case, only $100 a year for board and tuition, — the corporation may own its property, and use it directly in the education of its pupils, as well when the property is land upon which provisions are raised for their sustenance, as when it is real estate occupied by the houses in which they dwell. But if it seeks to promote its educational and charitable objects by obtaining profit from its property and filling its treasury for future use, that purpose is not within the exempting clause. The practical difficulty in cases of this kind is to ascertain the purpose for which the real estate is occupied; when that is determined, the result is reached.

In this case, the plaintiff's purpose in the use of its farm must be ascertained from its conduct, — its acts and the declarations accompanying them. Its general purposes in establishing the institution under the authority of its certificate of incorporation are very fully set forth in the facts reported. One was to teach the boys, among other things, agriculture. Another was to furnish them board and instruction at a small charge. Getting money and supplying the treasury was not one of the purposes for which the institution was founded. It was merely a means by which those purposes were to be accomplished.

Was this farm practically used to teach the boys agriculture, and give them physical training, and furnish them manual labor

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as a part of their education? Was it used to furnish supplies directly to this boarding-school, and so lessen the cost of education there? Or was it, on the other hand, used to produce revenue, and earn income which might afterward be expended for the school? It seems to us that the farm and the property upon it were used in the legitimate management of the school, directly to accomplish its purposes, and not to obtain money for subsequent use in accomplishing them. The fact that products were sold is a circumstance important only so far as it characterizes the use. We think that the sales were merely incidental to a use for the purposes of the institution. If certain valuable chemicals are produced in a school by practical instruction in chemistry, and are subsequently sold instead of being wasted, that does not change the character of the use of the apparatus and of the original ingredients employed. And if a farm is set apart and cultivated to supply food for a family or community, it does not cease to be used for that purpose because, in the economical management of it, there are certain products which cannot be utilized otherwise than by sale.

The same considerations apply to the last question under the statute, whether any portion of the property was "used or appropriated for other than literary, educational, benevolent, charitable, or religious purposes." So long as the personal property was held by the plaintiff, it was not used otherwise than incidentally to the use of the farm, and so was not liable to taxation. The subsequent sale of it had no retroactive effect to subject it to assessment. Unless restrained by special provisions of law, any institution may sell its property which is exempt from taxation, and properly dispose of the proceeds.

The sale of farm products is ordinarily evidence that a farm is used for profit, and in most cases it would deprive a party of the exemption here claimed; but under the peculiar facts of this case we deem it unimportant, and hold that the ruling that the action could not be maintained was erroneous.

Exceptions sustained.

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COMMONWEALTH *vs.* DENNIS SHURN.

Worcester. October 3. — 20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A copy of a material paper is admissible in evidence against one who, having the original in his possession, fails to produce it on notice.

At the trial of a complaint against A. for the sale of intoxicating liquor to B. at W., there was evidence that B. asked C. to get him some liquor when he went to M.; that the quantity ordered was delivered to B. at W.; and that he then paid for it and took a receipt for the money, which receipt purported to be a bill from A., signed in his name by D. There was also evidence that, at the trial in the district court, when A. was present, his counsel took possession of the receipt, and claimed the right to retain it, and refused to produce it, on notice, at the trial in the Superior Court. *Held*, that there was sufficient evidence to sustain the complaint.

COMPLAINT to the Central District Court of Worcester, for the sale at Worcester, on June 5, 1886, of intoxicating liquor to one John Buckley.

At the trial in the Superior Court, on appeal, before *Staples*, J., it was admitted that the defendant had a fourth class license, authorizing the sale of spirituous and intoxicating liquors in the town of Millbury at the time alleged in the complaint, and that no licenses were granted in Worcester for the year beginning May 1, 1886.

John Buckley, mentioned in the complaint, testified as follows: "I live in Worcester. I do not know the defendant. On June 5, 1886, I gave a verbal order to Mr. Reardon for some porter; told him if he went to Millbury to send it. I received a half-barrel of porter and receipted for it. It was brought in the evening to me in Worcester. I paid the person who brought it four or five dollars for it. I do not know that I ever saw him before or since. I took a receipt, which I put in a little room. The officers made a raid subsequently, and took it. The officers took the porter at the same time. The porter was delivered to me in the cellar of No. 85, corner of Market and Summer streets."

There was also evidence that a receipt was found at the house of John Buckley when the officers made a search, which read as follows: "Millbury, Mass., June 5, 1886. T. McGillicuddy to Dennis Shurn, Jr., Dr. To ½ bbl. porter $4.50. Received payment, D. Shurn, Jr., by J. Harper;" that this receipt was

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produced at the trial in the district court, and the defendant's counsel asked for it in the presence of the defendant, and, on its being handed to him, said he would retain it; that there was no T. McGillicuddy on Market Street in Worcester; and that the defendant in another case had pleaded to the name of Dennis Shurn, Jr.

The district attorney called upon the defendant and his counsel to produce the original receipt. The receipt was not produced, the defendant's counsel saying, "I do not know as I have it." The government was allowed to put in evidence a copy of said receipt, against the objection of the defendant, and subject to his exception.

The defendant asked the judge to rule that the foregoing evidence was insufficient in law to sustain the complaint. The judge refused so to rule, and the defendant excepted.

Among other requests for rulings the defendant asked the judge to instruct the jury as follows: "1. If the defendant received an order at his place of business in Millbury, with directions to forward the order to the consignee by his teamster, and he did so forward it, that would be a sale in Millbury. 2. If the defendant received an order at his place of business in Millbury, and filled the order, and, without any special directions, sent the goods to the person giving the order by his servant, that is not a sale in Worcester, but a sale in Millbury. 3. If the defendant received an order from a customer in Worcester, at his place of business in Millbury, either from the customer or from another person for him, or by mail, or in any way, and for cash or upon credit put up the order for his customer, and then by his servant sent it to his customer, that would not be a sale in Worcester."

The judge declined to give the rulings requested, stating that the third request was not based on the actual state of the evidence.

The judge instructed the jury, that, if the parties understood and intended that the title to the porter should not pass till it was delivered to and paid for by John Buckley, and it was so delivered to and paid for by him in Worcester, then the jury was warranted in finding that the sale was in Worcester.

The judge further instructed the jury, that it was for them to say whether the receipt was identified as the one given Buckley

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when the porter was delivered to him; that the receipt, if identified, did not of itself prove or tend to prove that Harper delivered the porter, or that he was the agent of the defendant in so doing, or that the porter came from the defendant; and that the evidence as to what took place in the court below, when the original receipt was produced, was to be considered by the jury, upon the question whether the defendant, by his acts or conduct, then and there admitted the receipt to be his receipt, given by his authority, and as a voucher for the payment set forth therein, or else admitted the same to be a paper in the suppression of which, as evidence in this case, he had an interest.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Hopkins, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

DEVENS, J. The defendant excepted to the admission in evidence of a copy of a certain receipt, purporting to be from Shurn, by one Harper, of the price of a certain half-barrel of porter. If the receipt itself would have been admissible as material upon the issue of the guilt of the defendant, it having been shown to have been taken into the possession of the defendant and his counsel, and they having refused to produce it, a copy was admissible. *Commonwealth* v. *Goldstein*, 114 Mass. 272.

The defendant further excepted to the refusal of the court to rule that there was no evidence sufficient in law to sustain the complaint. There was evidence that Buckley ordered, by one Reardon, porter from Millbury; that the quantity ordered was delivered to him in Worcester; that it was there paid for by him; and that he took a receipt for the amount paid from the man who delivered it to him. This was sufficient evidence of a sale in Worcester, although not of a sale by the defendant. While the receipt, if identified as the one delivered to Buckley, which purported to be signed by one Harper for the defendant, did not of itself prove that Harper was entitled to act for the defendant, or that the porter came from the defendant, it was for the jury to say whether the original receipt was thus identified, and whether, when produced at the trial in the district court, the defendant had by his acts and conduct admitted it to be his, or as given by his authority as a voucher for the payment set forth

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therein, or that he then endeavored to suppress a paper which would have afforded one step in the evidence against him. If so, evidence was afforded that the sale was made by him through his agent Harper. At the trial in the district court, Buckley made no claim to the original receipt. When it was produced, the defendant was present with his counsel; and the latter in the defendant's presence asked for it, then insisted on his right to retain it, did so, and at the subsequent trial in the Superior Court, although the receipt was demanded by the prosecuting attorney, it was not produced. This was an assertion of a claim, made in the defendant's presence by his counsel, of his right to this paper as his own property as against the government, and, when connected with the contents of the paper, affords some evidence that the transaction with Buckley was a sale made by the defendant through his agent.

To the other rulings and refusals to rule no exception was taken. *Exceptions overruled.*

JACOB H. FAIRBANKS *vs.* MARGARET P. SNOW.

Worcester. October 3. — 20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

In an action by the payee against the maker of a promissory note, it is no defence, that the defendant, a married woman, was induced to sign the note by threats made to her by her husband, if the payee took the note in ignorance thereof.

HOLMES, J. This is an action upon a promissory note made by the defendant and her husband to the order of the plaintiff. The defendant alleges that her signature was obtained by duress and threats on the part of her husband. The judge below found for the plaintiff, on the ground, it would rather seem, that, whether there was duress or not, the defendant had ratified the note, which there seems to have been evidence tending to prove. See *Morse* v. *Wheeler*, 4 Allen, 570; *Rau* v. *Von Zedlitz*, 132 Mass. 164. But as this may not be quite clear, we proceed to consider the only exception taken by the defendant. The judge refused to rule that, if the defendant signed the note

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under duress, it was immaterial whether the plaintiff knew, when he received the note, that it was so signed. The exception is to this refusal.

No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; and if the signature and delivery had not been her acts, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. There sometimes still is shown an inclination to put all cases of duress upon this ground. *Barry* v. *Equitable Life Assurance Society*, 59 N. Y. 587, 591. But duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable. *Foss* v. *Hildreth*, 10 Allen, 76, 80. *Vinton* v. *King*, 4 Allen, 562, 565. *Lewis* v. *Bannister*, 16 Gray, 500. *Fisher* v. *Shattuck*, 17 Pick. 252. *Worcester* v. *Eaton*, 13 Mass. 371, 375. *Whelpdale's case*, 5 Rep. 119 a. 1 Bl. Com. 130.

This rule necessarily excludes from the common law the often recurring notion just referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. *Tamen coactus volui.* D. 4. 2. 21, § 5. See 1 Windscheid, Pandekten, § 80.

Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud; and is, that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action. See *Rodliff* v. *Dallinger*, 141 Mass. 1, 6; *Stiff* v. *Keith*, 143 Mass. 224. But if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different. A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant. *Master* v. *Miller*, 4 T. R. 320, 338. *Masters* v. *Ibberson*, 8 C. B. 100. *Sturge* v. *Starr*, 2 Myl. & K. 195. *Pulsford* v. *Richards*, 17 Beav. 87, 95. *White* v. *Graves*, 107 Mass. 325.

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The authorities with regard to duress, however, are not quite so clear. It is said in *Thoroughgood's case*, 2 Rep. 9, that "if a stranger menace A. to make a deed to B., A. shall avoid the deed which he made by such threats, as well as if B. himself had threatened him, as it is adjudged 45 E. 3. 6." Sheppard, Touchstone, 61, is to like effect. See also *Fowler* v. *Butterly*, 78 N. Y. 68. But in Y. B. 43 E. III. 6, pl. 15, which we suppose to be the case referred to, it was alleged that the defendant was imprisoned by the procurement of the plaintiff. And we know of no distinct adjudication of binding authority that mere threats by a stranger, made without knowledge or privity of the party, are good ground for avoiding a contract induced by them.

In Keilwey, 154 a, pl. 3, "the defendant in debt pleaded that he made the obligation to the plaintiff by duress of imprisonment [on the part] of a stranger, and the opinion of Rede and others was that this is not a plea without making the obligee party to this duress."

In *Taylor* v. *Jaques*, 106 Mass. 291, 294, it was said that the defendant had to prove that he signed the note "under a reasonable and well-grounded belief, derived from the conduct and declarations of the plaintiffs, that if he did not sign it he would be arrested," &c. See *Green* v. *Scranage*, 19 Iowa, 461, 466; *Talley* v. *Robinson*, 22 Grat. 888; *Bazemore* v. *Freeman*, 58 Ga. 276; and the cases as to purchasers for value; *Clark* v. *Pease*, 41 N. H. 414; *Duncan* v. *Scott*, 1 Camp. 100. See also *Gilbert* v. *Stone*, Aleyn, 35; *S. C.* Style, 72; *Scott* v. *Shepherd*, 2 W. Bl. 892, 896.

Loomis v. *Ruck*, 56 N. Y. 462, was decided on the ground that, if the non-negotiable note in suit was in the first instance a contract between the plaintiff and the defendant, it was obtained through the agency of the defendant's husband in such a way as to make the plaintiff answerable for his conduct. Moreover, the older writers likened duress to infancy, and took a distinction between feoffments, &c. by the party's own hand, and acts done by letter of attorney, regarding the latter as wholly void. 2 Inst. 483. Finch, Law, 102. It has been held in New York and some other States, as well as in England, that a power of attorney given by an infant is void. *Fonda* v. *Van Horne*, 15 Wend. 631. *Knox* v. *Flack*, 22 Penn. St. 337. *Saunderson* v. *Marr*,

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1 H. Bl. 75. And if this supposed analogy were followed, the contracts in all the New York cases which we have cited would be void by the law of that State for want of a personal delivery by the defendant to the plaintiff. There may be still other explanations of the decisions.

In the present case it does not appear who delivered the note, and does not clearly appear that the defendant did not deliver it herself. The distinction as to powers of attorney has been limited, if not wholly done away with, in Massachusetts, in regard to infants. *Whitney* v. *Dutch*, 14 Mass. 457, 463. *Welch* v. *Welch*, 103 Mass. 562. *Moley* v. *Brine*, 120 Mass. 324. But we express no opinion as to the effect of duress upon such powers, oral or written.

On the case as it is presented to us, we are of opinion that the ruling requested was wrong upon principle and authority.

Exceptions overruled.

A. Norcross & H. C. Hartwell, (*C. F. Baker* with them,) for the defendant.

W. S. B. Hopkins & S. Haynes, for the plaintiff.

CHARLES W. WHITNEY, administrator, *vs.* JAMES CLARY.

Worcester. October 3.—20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

In an action on a promissory note, payable to A. and purporting to be signed by B. by his mark and to be witnessed, on the issue of the genuineness of the defendant's signature, the attesting witness testified that A. and B. were in the room adjoining the one he was in, the door being ajar; that A. wrote the note and read it to B.; that he was then called in to witness the note; that A. said, "This is B. who is giving his note, and I want you to witness it;" and that the witness then took the pen out of B.'s hand, read the note, and then witnessed it. *Held*, that the testimony was sufficient to warrant the jury in finding that B. duly signed the note.

When the signature to a promissory note is proved, the note itself is *prima facie* evidence of consideration.

In an action on a promissory note, to which the defence was want of consideration, it appeared that the payee held a note of a son of the maker, and that the maker was the administrator of his son's estate and his only heir, and gave the note in suit in renewal of the old note. *Held*, that, even if the old note could not have been enforced at law at the time the new note was given, there was sufficient evidence of consideration for the new note.

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CONTRACT, by the administrator of the estate of John H. Davis, upon a promissory note for $378, dated at Sterling on March 16, 1883, payable to the order of said Davis, purporting to be signed by the defendant by his mark, and to be witnessed by Susan P. Goodell, and containing the words "for value received." The note bore the following indorsement: "March 16, 1883, received $7." Writ dated August 5, 1886. Answer: 1. A general denial. 2. A denial of the genuineness of the signature. 3. Want of consideration.

Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff proved his appointment as administrator of the estate of John H. Davis, and testified that he found the note in suit among the papers of the intestate.

Susan P. Goodell testified as follows: "I kept house for John H. Davis, at Sterling, from 1881 to 1885. James Clary came to the farm at Sterling where Davis lived. They were in the dining-room adjoining the kitchen. I was in the kitchen, and the door was ajar between the rooms. Davis wrote the note. I heard him read it to Clary, then he stepped to the door and wanted me to put my name on the note to witness it. I went in there. I remember I took the pen out of Clary's hand and wrote with the same pen. I did not see Clary do anything with the pen. Davis said, 'This is Mr. Clary, William's father, who is taking up William's note, giving his, and I want you to witness it.' I signed the note. I read the note before I witnessed it. It was in the same condition then as now."

On cross-examination, the witness testified as follows: "Davis told me it was a renewal of William Clary's note. Davis said he wanted a renewal because William had died. I do not remember that James Clary said anything. After I signed the note I immediately left the room. I was in the room only a short time. I do not know of any money being paid that day. I knew the amount of the note at the time, but have forgotten it. I cannot testify to anything upon the note other than my handwriting. The rest of the note other than my name is in Davis's handwriting."

This was all the material testimony offered by the plaintiff to prove the signature to the note. The plaintiff then offered the

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note in evidence. The judge allowed the note to be put in evidence against the defendant's objection. The plaintiff then rested his case.

The defendant then testified as follows: "I did not know Davis till my boy William went to work for him eleven or twelve years ago. All the dealing I ever had with Davis was when I went to see my boy, and bought a cow, and gave my note for $50. I could not pay this note all at once, so I paid it in two payments. I think I paid $40 the first time, and gave him a new note for the balance, and he kept it till I paid the balance; it was for the cow. I never signed a note for the renewal of William's note. Saw Davis when I paid the balance for cow. I did not see Mrs. Goodell, and saw no one in the room. I did not stay long. I never got any money from Davis. I never saw Susan P. Goodell at Davis's house, and never knew of her witnessing any note or other instrument signed by me. My son's name was William Henry Clary. He died ten years ago last April. William borrowed $400 from Davis, and gave his note, and used the money in building a house upon real estate owned by him. I do not know if Davis held this note when he died. I do not know what became of it. I have not received it from Davis since my son died. I never had any talk with Davis about this note before or since William died. The only transaction I ever had with him was when I bought the cow and gave a note for it. I did not go there any time when Davis wrote a note and read it to me. Nothing was said to me about taking up William's note. I was the administrator of William Clary's estate. The date of administration was April 18, 1876.

The defendant then put in evidence the letter of administration on William H. Clary's estate, but there was no evidence of any further probate proceedings after the issuing of the letter of administration. It appeared that the defendant was the only heir of his son William, who, at the time of his decease, owned the real estate upon which he had used the money lent him by Davis. There was evidence that shortly before this action was brought, and since the death of Davis, the defendant had conveyed certain real estate to one of his sons for a nominal consideration.

This was all the material evidence offered to prove consideration of said note.

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The defendant asked the judge to rule that the plaintiff had not offered any evidence which would warrant the jury in finding that there was any consideration for said note, or that would warrant a verdict for the plaintiff. The judge declined so to rule, and submitted the case to the jury, with instructions as to the *prima facie* proof supplied by the note itself if its execution was proved, as to the burden of proof, and as to the right of the jury to determine upon the whole case the evidential value of this *prima facie* proof; which instructions were not excepted to.

The jury returned a verdict for the plaintiff for the amount of said note and interest; and the defendant alleged exceptions.

J. W. Corcoran & T. F. Gallagher, for the defendant.

A. Norcross & H. C. Hartwell, (*C. F. Baker* with them,) for the plaintiff.

MORTON, C. J. The testimony of the witness Goodell, if believed, was sufficient to justify the jury in finding that the note in suit was duly signed by the defendant, and that it was attested by the witness, with the knowledge of the defendant, and as a part of the same transaction with the making of the note. *Swazey* v. *Allen*, 115 Mass. 594, and cases cited. The defendant contradicted this witness, but it was for the jury to decide which was entitled to credit.

The signature of the defendant and the delivery of the note having been proved, the note itself was *prima facie* evidence of consideration.

But in this case there was evidence which would justify the jury in finding that the note in suit was given to take up and cancel an old note signed by the defendant's son and held by the plaintiff's intestate. The surrender of this note, even if it could not be enforced at law, was a sufficient consideration for the new note. *Wilton* v. *Eaton*, 127 Mass. 174. The case before us is much stronger in favor of the plaintiff than was the case of *Wilton* v. *Eaton*. In the case at bar, the defendant was the administrator and only heir of his son. He filed no bond as administrator, and nothing appears to show that his son's note, at the time of its surrender, could not be enforced against his estate.

Exceptions overruled.

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CHARLES H. BRACKENRIDGE *vs.* CITY OF FITCHBURG.
NELLIE M. BRACKENRIDGE *vs.* SAME.

Worcester. October 4. — 20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

It cannot be ruled, as matter of law, that a person who is driving a blind horse on a dark and rainy night cannot maintain an action against a town for an injury occasioned by a defect in a highway while so driving.

TWO ACTIONS OF TORT for injuries occasioned to the plaintiffs by reason of an alleged defect in North Street in Fitchburg. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

North Street is a side street leading from Main Street, and substantially level, and at the place of the accident the land upon each side of the location of the highway is low and wet. It appeared that the plaintiffs, who are husband and wife, on March 31, 1885, left their house in the evening, intending to go to a concert at the Opera House; that they were riding in an open buggy, the husband being the driver of the horse; that their house is on the outskirts of the city, about a mile from the Opera House on Main Street; and that in going to the Opera House they were driving along North Street when the horse suddenly went into a hole in the street, the left side of the wagon went down, the wagon was soon thrown over, and the plaintiffs were thrown out, and suffered the injuries complained of. It was raining a little, and "quite dark," at the time of the accident.

The evidence showed that there had been rains and a thaw a few days before the accident, which melted the snow, and that the frost was coming out of the ground; that the defect complained of consisted of a channel or ditch about three feet wide and two feet deep, and from forty to sixty feet long, about in the line of the left wheel ruts of the street, which had been caused by the water undermining the street and causing the street to cave in.

It appeared that the plaintiff Charles H. Brackenridge had owned the horse for about five years, and that for two years prior to the accident the horse had been totally blind, but was otherwise safe, and had been in constant use by himself and

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family. The plaintiff testified that he was at the time driving at the rate of about five miles an hour, and there was some evidence that he was driving faster than this.

The defendant asked the judge to instruct the jury, that, under the circumstances stated, a blind horse was not a safe and suitable horse to drive on the highway, and that the plaintiffs could not recover. The judge declined so to rule, but instructed the jury upon this point as follows: "If the blindness of the horse rendered him unsafe or unsuitable to drive on the highway at this time and in this manner, the plaintiffs cannot recover; nor can they if their negligence or the unsafety of the horse in any way contributed to the injury.

The jury returned a verdict for each of the plaintiffs; and the defendant alleged exceptions.

E. P. Pierce, for the defendant.

G. A. Torrey, for the plaintiffs.

HOLMES, J. It is too plain for extended argument, that the court was right in refusing to rule, as matter of law, that the plaintiffs could not recover for a defect in the highway because they were driving a blind horse on a dark night. See *Smith* v. *Wildes*, 143 Mass. 556; *Wright* v. *Templeton*, 132 Mass. 49; *Daniels* v. *Lebanon*, 58 N. H. 284. It was for the jury to consider how dark the night was. They might have found that the plaintiffs could see the road. They might have found that a horse with sound eyes could not have done so. Whatever the degree of darkness, it was for the jury to say whether the horse's possession of sight would have diminished appreciably the chances of the accident, and it was at least open to them to find that the plaintiffs had a right to assume that the city had done its duty, and therefore that they were not bound to provide against its possible neglect. See *Thompson* v. *Bridgewater*, 7 Pick. 188; *Learoyd* v. *Godfrey*, 138 Mass. 315, 324; *Smith* v. *Wildes*, *ubi supra*; *Glidden* v. *Reading*, 38 Vt. 52, 57.

Exceptions overruled.

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JOHN MILLER *vs.* TIMOTHY SHAY.

Worcester. October 4. — 20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A book of original entries kept by a man who is unable to write, and in which the only entries are straight marks, is admissible in evidence, when supported by his suppletory oath.

If goods are delivered by a servant, and his entries or marks are transferred to the master's account-book, the servant is a competent and necessary witness to support the charges and to prove the delivery.

CONTRACT, upon an account annexed, for two hundred and fifty-three loads of sand, at forty cents a load. After the former decision, reported 142 Mass. 598, the case was tried in the Superior Court, before *Staples*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff testified that he made a contract with the defendant to supply sand to be used in building, at forty cents a load; that he delivered some of the loads himself, and employed his son, and one McCann and Joseph Pratt to draw and deliver other loads; that, when he himself delivered any, he put a straight mark in a small account-book for each load; that when McCann or Pratt worked, each of them marked daily the number of loads each drew on the side of the cart, and reported the number to the plaintiff, who made corresponding marks in his book, and the marks on the cart were then rubbed out; that the number of loads drawn by Pratt, McCann, and himself amounted to two hundred and fourteen; that he could not write, and could read but little; and that he had received from the defendant on account the sum of $65.

Joseph Pratt testified that he drew some of the sand in question for the plaintiff; that he always gave in the account every day to the plaintiff; and that he kept it by a chalk mark on his wagon for every load he drew. Against the objection and exception of the defendant, the witness was allowed to testify that every day he drew sand he counted the marks for the sand drawn that day, and reported to the plaintiff the number; that he reported to him correctly the number of loads drawn each day; and that this continued all the time he drew sand there, some three months.

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Edward McCann testified that he drew some of the sand, under the plaintiff's direction; that when he drew a load of sand he always marked it down on the side-board of the cart, and at night reported to the plaintiff how many he had drawn; that he reported correctly each day; and that after the report Miller rubbed out the marks.

William Miller, son of the plaintiff, testified that he drew some of the sand, thirty-five loads, and kept an account of it himself (the account was produced and identified); that the handwriting was his; and that he kept the account with book and pencil of the number of loads he drew.

The plaintiff offered in evidence the book first mentioned, being the one kept by him. The book showed no debit or credit side, and did not mention the name of the defendant. On different pages appeared a series of straight marks, which aggregated two hundred and fourteen. It was not contended that the book itself exhibited any appearance of fraud or falsehood.

Against the objection of the defendant, the judge held, that the book was competent evidence, in connection with the evidence adduced by the plaintiff, if believed, and was part of the *res gestæ*, and admitted the same.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. A. Gile, for the defendant.

G. T. Dewey, for the plaintiff.

MORTON, C. J. The small account-book kept by the plaintiff, showing the number of loads of sand delivered, was properly admitted in evidence. It was a rough and imperfect book of accounts, but it was honestly kept, and was the record of the daily business of the plaintiff, made for the purpose of establishing a charge against another. *Pratt* v. *White*, 132 Mass. 477. Such a book, supported by the oath of the plaintiff, is competent, though the account was kept only by marks, the plaintiff being unable to write. These entries are intelligible, and no more liable to fabrication than other entries. It is a book of original entries, though the marks were transferred from marks made on the cart by the servants of the plaintiff who delivered the sand. *Smith* v. *Sanford*, 12 Pick. 139. *Kent* v. *Garvin*, 1 Gray, 148. *Harwood* v. *Mulry*, 8 Gray, 250.

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Where goods are delivered by a servant, and his entries or marks are transferred to the master's account-book, it has been held that the servant must be a witness to support the charges and to prove the delivery. *Kent* v. *Garvin*, *ubi supra*. In the case before us, therefore, the testimony of Joseph Pratt was competent and necessary.

If there was doubt whether the plaintiff's book ought to have gone to the jury, there is another ground upon which the defendant's exceptions should be overruled. In a transaction like that involved in this case, it is not to be expected that any memory unaided could retain accurately the number of loads of sand delivered. The plaintiff had clearly the right to use his account-book as a memorandum to refresh and aid his memory. The fact that the book went to the jury could not prejudice the defendant. The only possible use the jury could make of it would be to count the marks, and see if the plaintiff had stated their number correctly. The exceptions show that the plaintiff's count was correct, and it is of no consequence to the defendant whether the jury took this number from the plaintiff's testimony or from a count of the marks. A new trial would not be granted because of the admission of incompetent testimony which is entirely immaterial. *Exceptions overruled.*

WILLIAM I. MARSHALL *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Worcester. October 4. — 20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

In an action against a railroad corporation for an assault and false imprisonment, it appeared that the plaintiff, who was the holder of a mileage coupon ticket, tendered, while a passenger on a train on the defendant's railroad, some of the coupons in payment of his fare, in violation of the conditions of the contract under which he held them; and that the conductor of the train refused to receive them, and arrested him. The plaintiff at the trial asked the judge to rule that the evasion or attempt to evade the payment of fare, for which a passenger may be lawfully ejected or removed from a railroad car must be a fraudulent evasion, with an intention to defraud the railroad company." The judge refused so to rule, but did rule that the coupons offered by the plaintiff to the conductor were not a legal tender of his fare, and that, upon the plaintiff's

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refusal to make any other payment, the conductor, who was a railroad police officer, might arrest him without a warrant. The plaintiff excepted to the refusal to rule as requested, but not to the ruling given. *Held*, that the words "ejected or removed" in the ruling requested were not to be construed as meaning "removed by arrest."

If a party to an action seeks to justify an act on the ground that he believed that he had a right to do as he did, and his belief is a material issue, he cannot, as of right, strengthen his direct testimony as to what his belief was, by testifying to other facts which would make it likely that he believed as he said.

TORT. The declaration contained three counts: the first, for an assault; the second, for an assault and for false imprisonment; and the third, for malicious prosecution. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff was a public lecturer, and, having delivered a lecture at Poughkeepsie in the State of New York, on the night of April 4, 1885, he sent his assistant by night train to Palmer, in this Commonwealth, intending himself to go to Palmer on April 6. The plaintiff was the owner of a thousand-mile coupon mileage ticket, good to bearer over the defendant's railroad, which he had bought some two months before. This coupon-book was in the usual form, and contained on the first page the following printed clause: "To be used upon the conditions named in the contract attached to and made a part hereof." And on the back page was printed the following: "Contract. The conditions upon which this mileage coupon ticket is sold by the Boston & Albany R. R. Co., and purchased and used by the bearer of this ticket, are as follows: 1st. That conductors shall detach in consecutive order coupons, representing the distance travelled, except when presented for any distance less than three miles, then three coupons shall be detached. 2d. That all mileage coupons will be void if detached by any person but the conductor."

The plaintiff tore out seven pages, containing one hundred and forty coupons, from this book, and gave the balance of the book to his assistant for his use in going to Palmer, instructing him to meet the plaintiff at the depot in Palmer, on April 6, upon the arrival of the train, with this book. Upon April 6 the plaintiff took the train on the defendant's road at Greenbush (near Albany) intending to go to Palmer, and, when the

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conductor asked him for his ticket, he offered him these coupons, which he had torn from the mileage book, which in amount were more than sufficient to pay his fare to Palmer at coupon rates. These coupons entitled the holder to ride one mile upon each coupon, and were sold at the rate of two cents per coupon, being at a less rate than the cash fare for travel. The conductor asked the plaintiff if he had the book from which these coupons had been detached, and the plaintiff explained to him the circumstances of his sending the book to Palmer by his assistant, and told him that he could see the book when the train arrived at Palmer, as his assistant would be at the depot with it. The conductor declined to accept these coupons for the plaintiff's fare, and demanded the amount of the cash fare to Springfield, which was as far as that conductor was to go on that train, as he then informed the plaintiff. The plaintiff stated his belief that the coupons were good, and gave to the conductor his card, showing his name, business, and residence. The conductor told the plaintiff that he had no doubt that the plaintiff owned the book, but stated that the coupons were not good without the book, and declined to accept them. At several other times and places, before the arrival of the train at Pittsfield, conversations similar to the above took place between the plaintiff and the conductor, the plaintiff offering these coupons for his fare, and the conductor declining to accept them.

There was evidence tending to show that, upon the arrival of the train at Pittsfield, the conductor called a policeman of the town of Pittsfield into the car, and again, in the presence of the police officer, demanded of the plaintiff the payment of his fare, and that the plaintiff again tendered said coupons, and refused to pay otherwise; and that thereupon the conductor, who was a railroad police officer, arrested the plaintiff and placed him in charge of the police officer, who took the plaintiff to the police station in Pittsfield, and afterwards to the district court, where he made a complaint against the plaintiff, which complaint was signed and sworn to by the said police officer, for "fraudulently evading the payment of the fare by refusing to pay the fare lawfully established by the Boston and Albany Railroad Corporation," and the plaintiff was placed under recognizance for his appearance before said court on April 15.

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The plaintiff testified that the conductor was insulting in his language to him at Pittsfield, in that he said to him in a loud tone, as he came into the car with the policeman, "What are you going to do about that fare of yours to Pittsfield, or Springfield, or wherever you are going?" and that this was said in the presence of a large number of passengers who had entered the train at Pittsfield. The conductor denied using this language.

It appeared from the evidence for the defendant, that the following, among other rules for the government of conductors, had been established by the defendant corporation, and was in force at the time: "Coupons detached by passengers will be refused and fare collected, unless passengers can show the book from which coupons were detached, which must agree in number and form." This rule was not known to the plaintiff.

At the trial of the plaintiff upon said complaint, on said April 15, he was acquitted, and ordered by the court to be discharged. The defendant corporation employed counsel, who appeared in the prosecution of the plaintiff before said district court at this trial.

The defendant put in evidence that they had consulted learned counsel on the day preceding said trial, relative to said prosecution, and, having fairly informed him of all the facts, were advised by him that the plaintiff was liable under said complaint.

The plaintiff, for the purpose of showing his intent and belief that the said coupons were a proper tender of his fare, offered to prove that he had frequently seen the conductors on the defendant railroad accept, without objection, in payment of fare, similar coupons, which had been detached from similar mileage books by passengers or others than such conductors; but the judge excluded the evidence in this form, and for the specific purpose for which it was offered, but stated, if the plaintiff proposed to prove a custom of the defendant to accept coupons so tendered, that the evidence would be admissible.

The plaintiff asked the judge to rule that "the evasion or attempt to evade the payment of fare, for which a passenger may be lawfully ejected or removed from a railroad car, must be a fraudulent evasion, with an intent to defraud the railroad company;" but the judge declined so to rule, and did rule that the coupons offered by the plaintiff to the conductor were not

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a legal tender of his fare, and that, upon the plaintiff's refusal to make any other payment, the conductor, who was a railroad police officer, might arrest him without a warrant.

Upon the count for malicious prosecution, the judge gave full instructions, to which no exception was taken, as to what would constitute probable cause on the part of the defendant and the conductor, and that the defendant would not be authorized to prosecute the plaintiff, in the manner in which the complaint was made in this case, for a mere evasion to pay fare, unless it was a fraudulent evasion.

The jury found, upon a special issue submitted to them, that the arrest of the plaintiff was made by the conductor as a railroad police officer; and, after the return of their verdict, the foreman of the jury, in reply to a question of the judge, said that they found that the defendant in the prosecution of the plaintiff was acting under the advice of counsel, to whom a full statement of the facts had been made by the defendant.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the refusal to rule as requested, and to the exclusion of the evidence offered.

H. C. Hartwell, for the plaintiff.

F. P. Goulding, for the defendant.

HOLMES, J. 1. The ruling requested by the plaintiff was, that "the evasion or attempt to evade the payment of fare, for which a passenger may be lawfully ejected or removed from a railroad car, must be a fraudulent evasion, with an intent to defraud the railroad company." There is no question, and the plaintiff does not dispute, that this request for a ruling, if taken literally, was rightly refused. *Beckwith* v. *Cheshire Railroad*, 143 Mass. 68. We are asked to construe the words "ejected or removed," in connection with the facts and with instructions given, and not excepted to, as meaning "removed by arrest," or, in other words, "arrested." We think, however, that the suggestion does too great violence to the language used, and that we should not be warranted in assuming that the judge to whom the request was addressed understood it as the plaintiff would have us understand it.

2. "The plaintiff, for the purpose of showing his intent and belief that the said coupons were a proper tender of his fare,

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offered to prove that he had frequently seen the conductors on the defendant railroad accept, without objection, in payment of fare, similar coupons, which had been detached from similar mileage books by passengers or others than such conductors; but the judge excluded the evidence in this form, and for the specific purpose for which it was offered, but stated, if the plaintiff proposed to prove a custom of the defendant to accept coupons so tendered, that the evidence would be admissible."

It would seem that the plaintiff could not have been injured by the exclusion of the evidence as stated. For, upon the rulings of the court under which this case was tried without objection by the plaintiff, his belief or intent was only material to the count for malicious prosecution, and the verdict for the defendant on that count was based on the finding that it acted under the advice of counsel. But the evidence was properly excluded. If the plaintiff's actual belief was material, and was really controverted, he could not, as of right, strengthen his direct testimony as to what his belief was by testifying to other facts which would make it likely that he believed as he said. *Delano* v. *Smith Charities*, 138 Mass. 63. This seems to have been the purpose for which the evidence was offered. If it had been offered to show that the defendant company had justified the plaintiff's conduct by its own, the court was ready to admit it, subject to proper limitations. *Exceptions overruled.*

HENRY N. TUTTLE *vs.* GEORGE H. GILBERT MANUFACTURING COMPANY.

Worcester. October 4. — 20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A lessee of a building, who sustains personal injuries occasioned by the defective condition of the building, cannot maintain an action of tort against the lessor, founded upon a breach by the lessor of an agreement to repair the building within a reasonable time.

TORT. The declaration was as follows: "And the plaintiff says that, in the early part of the year 1884, he together with

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his brother hired of the defendant a farm, with a house, barn, and other buildings thereon, the property of the defendant, situated in Ware, in the county of Hampshire, for the term of one year from April 1, 1884. At the time said premises were hired as aforesaid, the boards and planks making the floor in the barn were old, worn out, and defective, and in need of repair. As a part of the contract of hiring, and in consideration of the promise of the plaintiff and his brother, that they would hire said premises and pay rent therefor for said term, the defendant promised and agreed that it would immediately repair the said floor in a proper manner, and also further promised and agreed that if, in making the repairs upon said floor, it should be found that the timbers or joists upon which the boards and planks making the floor were laid, and by which said floor was supported, were poor, insufficient, unsuitable, decayed, or defective, it would replace all such timbers and joists with new and suitable ones. The plaintiff entered into possession and occupancy of said premises under said contract, and so continued until and after the injuries hereinafter complained of. The defendant, though often properly notified and requested to make said repairs, and after promising that it would do so, failed and neglected to make said repairs, or any part thereof, until after the date of the injury hereinafter complained of. On May 26, 1884, while the plaintiff was at work in said barn, in the exercise of due care, the timbers and joists supporting said floor being insufficient, unsuitable, decayed, and defective, gave way, and fell, with the floor and the plaintiff standing thereon, a great distance, to the ground or floor below, thereby greatly injuring the plaintiff in his person, causing him great pain and suffering, and much expense for care, nursing, medicine, and medical attendance, and rendering him unfit and incapable of performing manual labor during the remainder of his life. Said injuries were in no way caused by any fault or neglect on the part of the plaintiff, but wholly from the neglect and failure of the defendant to make said repairs, as it was its duty and obligation to the plaintiff to do." Answer, a general denial.

Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, which, after stating that the pleadings were made a part thereof, was in substance as follows:

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The evidence showed that the plaintiff, in 1883, was living on a farm belonging to the defendant in Ware, recently purchased by the defendant, (the plaintiff being the first and only tenant since the purchase and not having lived there before,) under a lease expiring on April 1, 1884; and that in the month of March, 1884, it was decided that his brother Herbert should come to the farm and occupy it with him the following year, if satisfactory arrangements could be made with the defendant. Accordingly, application was made to one Dexter, the agent of the defendant, whose full authority was admitted, who said he would see the company and report.

The plaintiff called as a witness Herbert N. Tuttle, his brother, who testified as follows: "I first saw Dexter about March 1, when he drove up right opposite the barn, and stopped. I asked him if the place was going to be rented another year? He said he did not know, but would let us know in a few days. I told him I wanted to lease the farm with my brother. My brother was present at that time. Eight, or ten, or twelve days after, he drove down to the house and came into the sitting-room, where my brother and I were, and sat down. He said he had spoken to the company about renting the farm, and they had made up their mind to let us young men have it. I asked what the rent would be, and he said $400. Then I turned to my brother and asked him what he thought, and he said we would take it. I said, 'Now, Mr. Dexter, I will tell you what we want, if we take the farm and give you $400, we want you to put the buildings in repair,' and he said he would. He said, 'What repairs do you want?' and we told him we wanted some repairs in the house, and, still further, that the barn wanted the doors fixed up, and the inside battened up, and the stable floor fixed. He said he would make the repairs. He sat a few moments, and said, 'Let us walk out to the barn and see what is wanted.' So we walked out, and I pointed to him the barn doors, and the side of the barn, all open, for him to batten up inside, and the stable floor; there were three or four places where the floor was broken through, and planks or boards nailed over them. I asked if he would put in new planks there, and he said he would, and said, 'When we take these old planks up, and put in new ones, if any other repairs are needed in the timbers underneath, we will fix

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them, but I consider it safe.' I told him I wanted it fixed up because I had some cows that were very large, and I wanted it fixed safe. He said he would fix it. I moved over on April 1st or 2d, and put my cows into another barn on the place for a few days to feed out some hay, and kept the cattle in that barn for about two weeks. During these two weeks, Dexter drove around one morning, and said he thought he would call and see how the stock looked, and I spoke to Dexter and told him I should want to move the cattle up to the other barn as quick as I got the hay fed out, if he would have the floors fixed, and he said he would do it right off.

"Between April 21 and 26 the company sent down some men with sheathing and boards and shingles for the house, and the rest for the barn. They were about to shingle the house, and I told the carpenter that we could not have the house fixed then, because my wife, who had just been confined, was sick down stairs, and they went off.

"My brother was injured on May 26, 1884. About five o'clock that morning, we drove our cows into the barn and stanchioned them up, and he sat down and milked one cow before I got done, and then stepped into the barn floor to strain it out, and then sat down and was milking the second cow, and I stepped out into the floor to strain my milk, and just as I was going to bend over to strain it, I heard a noise, and I turned and looked, and he and the cattle were all gone. That was all the warning we had about it. Nothing more than two or three planks remained on the outside of the floor. This floor was large enough to tie up eight cows, and the fall was eight or nine feet to the ground below. I saw my brother down there, and I called to him, but he did not answer. I went down and found a cow lying across him, and a stick of timber right under his back. I got hold and lifted on the timber and got him out.

"I did not know of the dangerous condition of the barn. I drew the joists out afterward and cut them up. They were not sound. They were rotten where they went into the sill, and were all rotten at the end; some of the ends were broken off. When the men came to repair, after the injury, they took out the old sill and put in a new one. The timbers were all stained, and when I cut them up I found them in a rotten condition."

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The plaintiff testified, in his own behalf, as to the extent of his injuries, and to the manner in which they were received; and as to the conversations with Dexter said: "I asked Dexter about renting the farm, and if they were going to rent the farm another year; he said he could not fully decide until he saw the company, and would let us know in a few days. He afterwards came to my house. My brother was present. He, Dexter, came down and said the company had concluded to let the young men have the place another year; he said that he would rent it for $400 a year; then my brother spoke up and said he would take the farm at $400 and he wanted them to repair the buildings. The house leaked, and in the floor in the hall there were places that were rotted out, and also a room used for a kitchen. He said he would put them in repair, and my brother then spoke about the barn, and Dexter said, 'We will go out to the barn and see what is wanted.' My brother said he wanted the stable floor fixed, and the barn battened up, and also planked in the stable. He showed him the door, then the battening of the side, then the putting in new planks, and he said he would take out what poor planks there were and put in new ones, and if there were any timbers needed underneath these that he would replace them, but to all appearances he considered it safe. He said he would put in new planks, and if it needed any new timbers underneath these — but to all appearances he considered it safe — he would put them in, but could not tell until he took up the floor; he could tell better after they took up the floor, — could tell how the timbers were underneath. We were then in the stable. There were in the stable floor one or two short planks, and then one which was back from the short plank; then there was one right in front of the door that was broken; they were decayed, and then the places where they were broken, boards were nailed over except right by the door, and planks were nailed over that. There were two or three of these."

The defendant offered as a witness William Dexter, who testified as follows: "I did not have any knowledge of any imperfection about the floor; I was there in the winter, when Henry occupied the place by himself, and looked under the barn. I could not get under there on account of the manure. I stepped under the corner, and looked through to see if everything was

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all right, and pronounced it to be in good condition. That was in the winter, when Henry occupied the place by himself, in the winter before that spring."

Upon this evidence, the judge ruled that the plaintiff could not recover for his personal injuries; and ordered a verdict for the defendant. The plaintiff alleged exceptions.

H. W. King & C. M. Rice, for the plaintiff.

W. S. B. Hopkins, for the defendant.

MORTON, C. J. It is the general rule that there is no warranty implied in the letting of premises that they are reasonably fit for use. The lessee takes an estate in the premises hired, and he takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor, or of deceit. A lessee, therefore, if he is injured by reason of the unsafe condition of the premises hired, cannot maintain an action against the lessor, in the absence of warranty or of misrepresentation. In cases where lessors have been held liable for such injuries to the lessees, the liability is founded in negligence. *Looney* v. *McLean*, 129 Mass. 33. *Bowe* v. *Hunking*, 135 Mass. 380, and cases cited.

The plaintiff admits the general rule, but contends that this case is taken out of it because, at the time of the letting, the defendant agreed to repair and put in a safe condition the stable floor, the unsafe condition of which caused the injury. The contract relied on is a loose one; it fixed no time within which the repairs were to be made, and it is doubtful whether the evidence proved any breach of contract on the part of the defendant. But if we assume that the contract was to make the repairs within a reasonable time, and that the jury would be justified in finding that the defendant had not performed it within a reasonable time, the question is whether, for such a breach, the plaintiff can maintain an action of tort to recover for personal injuries sustained by reason of the defective condition of the stable floor.

The cases are numerous and confusing as to the dividing line between actions of contract and of tort, and there are many cases where a man may have his election to bring either action. Where the cause of action arises merely from a breach of promise, the action is in contract.

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The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. Otherwise, the failure to meet a note, or any other promise to pay money, would sustain an action in tort for negligence, and thus the promisor be made liable for all the consequential damages arising from such failure.

As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract. In the case at bar, the utmost shown against the defendant is that there was unreasonable delay on its part in performing an executory contract. As we have seen, it is not liable by reason of the relation of lessor and lessee, but its liability, if any, must rest solely upon a breach of this contract.

We do not see how the cases would differ in principle if an action were brought against a third person who had contracted to repair the stable floor and had unreasonably delayed in performing his contract. We are not aware of any authority for maintaining such an action. If the defendant had performed the work contemplated by its contract unskilfully and negligently, it would be liable to an action of tort, because in such case there would be a misfeasance, which is a sufficient foundation for an action of tort. Such was the case of *Gill* v. *Middleton*, 105 Mass. 477.

The case of *Ashley* v. *Root*, 4 Allen, 504, does not conflict with our view, but recognizes the rule that to sustain an action of tort there must be more than a mere breach of contract.

The plaintiff now argues that he had the right to go to the jury upon the questions of warranty and deceit. It does not appear that this claim was made in the Superior Court; but it is clear that there is no sufficient evidence of any warranty that the stable was safe, or of any deceit or misrepresentation on the part of the defendant or its agent. *Exceptions overruled.*

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CHARLES W. WOOD *vs.* WILLIAM T. BOYD & others.

Worcester. October 5. — 20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A., the owner of a tract of land, having a house on the southerly side, and bounding on the north on a turnpike, conveyed the northerly portion of it to B., reserving to himself, his heirs and assigns, a right of passageway from his house to the turnpike. A. subsequently sold the remainder of the estate to C., and conveyed to him, his heirs and assigns, the right of a passageway from the dwelling-house on the estate to the turnpike. C. divided the land into two lots, and sold the southerly lot to D. and conveyed to him, his heirs and assigns, a right of passage to the turnpike. Subsequently, B. sold the lot on the turnpike to E., "reserving to the owner and his assigns of the adjoining estate, formerly of A., the right of a passageway to the turnpike." The heirs of E. afterwards sold the lot on the turnpike to F. "reserving to the owner of the estate and others adjoining on the south a right of passageway over the within granted premises as specified in deed of B. to E." *Held*, that the language of the two deeds last named as to the passageway constituted an exception, and not a reservation, and that the exception was not confined to the right which the owner of the lot immediately adjoining on the south might have to a passageway, but applied also to the right of the owner of the most southerly lot owned by D. *Held, also*, that there was no breach of a covenant against incumbrances contained in the deed to F.

CONTRACT, for breach of a covenant against incumbrances, in a deed from the defendants to the plaintiff. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows:

On August 19, 1836, Nathan Heard, who then owned a farm bounded northerly on a turnpike, and having a house upon it on the southerly side, conveyed to James Estabrook the northerly portion lying between the house and the turnpike. This deed contained the following clause: "reserving to said Heard, his heirs and assigns, the right of passageway from his dwelling-house to the turnpike aforesaid, and through the premises, as the same is now enjoyed."

The turnpike referred to is now Belmont Street, and the right to use the passageway has been conveyed, in substantially the same language, by several mesne conveyances, from Heard to Ann B. Earle, who now resides on the same premises and in the same house which Heard occupied at the time of his deed to Estabrook.

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On August 19, 1836, Nathan Heard conveyed to John F. Clark all of his homestead estate, and on October 22, 1839, he made, upon the back of that deed, a conveyance to Clark, his heirs and assigns, of "the right of a passageway from the dwelling-house on the estate to the turnpike," over the estate conveyed to Estabrook, "meaning to convey the passageway the same as it is now enjoyed." The conveyance of the right of passage was recorded on November 22, 1839.

On October 3, 1839, Clark conveyed to Edward Earle the estate conveyed to him by Heard, "excepting the part of said homestead sold by Heard to James Estabrook," and also reserving a strip of land lying south and east of the house sold to Estabrook. This strip of land, thus reserved, lies between the land sold to Estabrook and the southerly part of the Heard farm.

On November 22, 1839, Estabrook conveyed to Rodney A. Miller the lot bordering on the turnpike, "reserving to the owner and his assigns of the adjoining estate, formerly of said Heard, the right of a passageway from the dwelling-house on said estate to the turnpike aforesaid, and through the premises as the same is now enjoyed, being the same estate conveyed to me by deed from Nathan Heard, bearing date August 19, 1836."

On July 18, 1884, the defendants, who had acquired by inheritance the estate of Rodney A. Miller, conveyed the lot bordering upon the turnpike to the plaintiff. The deed, after describing the premises by metes and bounds, contained this clause: "Reserving to the owner of the estate, and others adjoining on the south, a right of passageway over the within granted premises as specified in deed of James Estabrook to Rodney Miller, dated November 22, 1839." The deed also contained the usual covenant that the premises "are free from all incumbrances."

At the time of the deed to the plaintiff, the lot immediately south of it was owned by Josephine H. Cutter, who derived her title from Clark. South of this lot was the lot of Ann B. Earle.

The plaintiff contended that the right of way possessed by Ann B. Earle by virtue of the clause in the deed from Heard to James Estabrook was an incumbrance on his land; and that the passageway mentioned in the defendant's deed to him terminated at the death of John F. Clark or of Edward Earle, both of whom died before the date of the deed to the plaintiff.

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The defendants contended that the language relating to a passageway in their deed to the plaintiff constituted an exception and not a reservation, and that the same was true of the language in the deed from Estabrook to Miller.

The judge ruled in accordance with the defendants' contention. The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

B. W. Potter, for the plaintiff.

F. P. Goulding, for the defendants.

MORTON, C. J. The plaintiff's lot was formerly a part of a larger lot owned by one Heard. In 1836, Heard conveyed the plaintiff's lot to one Estabrook by a deed containing the following clause: "reserving to said Heard, his heirs and assigns, the right of passageway from his dwelling-house to the turnpike aforesaid, and through the premises, as the same is now enjoyed." This right of way was conveyed by deed of Heard, and by several mesne conveyances, to Ann B. Earle, who now owns and occupies the house formerly owned by Heard. It is this right of way, in favor of said Earle, which the plaintiff contends is an incumbrance on his estate, and within the covenant of his deed from the defendants. His deed contains a covenant that the granted premises are free from all incumbrances, and the question in this case is, What are the granted premises? The deed, after the description of the land by metes and bounds, contains this clause: "reserving to the owner of the estate, and others adjoining on the south, a right of passageway over the within granted premises, as specified in deed of James Estabrook to Rodney Miller, dated November 22, 1839."

We think the purpose and effect of this clause was to except out of the grant to the plaintiff any rights to use the passageway specified in the deed of Estabrook belonging to any of the owners of the estate formerly of Heard. The deed of Estabrook to Miller contains this clause: "reserving to the owner and his assigns of the adjoining estate, formerly of said Heard, the right of a passageway from the dwelling-house on said estate to the turnpike aforesaid, and through the premises, as the same is now enjoyed." Prior to this deed Heard had conveyed to one Clark, his heirs and assigns, all his estate south of the plaintiff's lot, together with "the right of a passageway

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from the dwelling-house on the estate to the turnpike" over the estate conveyed to Estabrook, "meaning to convey the passage-way as it is now enjoyed," and there was a defined existing passageway, the same as is now used.

We are of opinion that both the above-cited clauses, in the deed of Estabrook to Miller and in the deed of the defendants to the plaintiff, operated as exceptions, and not as reservations. A reservation in a deed vests in the grantor some new right or interest not before existing in him. It cannot vest any right in a stranger to the deed. *Murphy* v. *Lee*, 144 Mass. 371. It operates by way of an implied grant; and, if it does not contain words of inheritance, it will give only an estate for the life of the grantor. The operation of an exception is to retain in the grantor some portion of his former estate, which by the exception is taken out of, or excluded from, the grant; and whatever is thus excepted remains in him as of his former title because it is not granted. *Ashcroft* v. *Eastern Railroad*, 126 Mass. 196. In both clauses the word "reserving" is used, but this is of little importance. The plain purpose of the parties was not to reserve any new right which should vest in the grantor, but to recognize, and except from the grant, rights of way existing by prior grants in third persons who were not parties to the deed. Nothing is reserved to the grantor in either deed; the terms used in both are "reserved to the owner of" the adjoining estate, and others. Both clauses are of no effect, unless they are held to be exceptions.

Construing the clause in the plaintiff's deed as an exception, it qualifies and limits the estate granted. "The granted premises" which are covenanted to be free from incumbrances is not the land in fee, but the fee diminished by existing easements, which are excepted out of the grant. Such easements are not incumbrances upon "the granted premises." They are excepted as they existed, that is as perpetual easements, and there is no ground for contending that they terminated at the death of Earle or Clark. *Exceptions overruled.*

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SAMUEL E. SIMANOVICH *vs.* MINARD WOOD.

Worcester. October 6. — 20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

In an action for breach of a covenant against incumbrances in a deed of land from the defendant to the plaintiff, oral evidence is inadmissible to prove that, at the time the deed was given, and as a part of the consideration, the plaintiff promised to pay an assessment then existing upon the land.

MORTON, C. J. This is an action of contract on a covenant against incumbrances in a deed from the defendant to the plaintiff. It is admitted that an unpaid assessment upon the land was an incumbrance within the covenant. *Carr* v. *Dooley*, 119 Mass. 294. The defendant offered to prove, by parol testimony, that, at the time the deed was given, and as a part of the consideration, the plaintiff promised to pay said assessment.

This evidence was rightly rejected. It directly varied and contradicted the written contract of the defendant. The covenant is against all incumbrances. The evidence offered was for the purpose of showing an oral agreement that the incumbrance created by the assessment was not within the covenant.

While for some purposes it is competent to show what the real consideration of a deed is, a party cannot, under the guise of showing what the consideration is, prove an oral agreement, either antecedent to or contemporaneous with the deed, which will cut down or vary the stipulations of his written covenant. This would violate the well-settled rule of law, which will not permit a written contract to be varied or controlled by such testimony. *Howe* v. *Walker*, 4 Gray, 318. *Spurr* v. *Andrew*, 6 Allen, 420. *Flynn* v. *Bourneuf*, 143 Mass. 277.

Exceptions overruled.

J. Mason, for the defendant.

R. Hoar, for the plaintiff.

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COMMONWEALTH *vs.* JOHN BUCKLEY & another.

Plymouth. October 18. — 20, 1887. C. ALLEN & KNOWLTON, JJ., absent.

An indictment on the Pub. Sts. *c.* 202, § 29, for threatening to accuse Frank E. White of having committed a crime, is not sustained by proof that the person so threatened was Frank A. White, there being no evidence that he was ever called Frank E. White.

INDICTMENT, against John Buckley and John Clune, on the Pub. Sts. *c.* 202, § 29, alleging that the defendants, on May 14, 1887, at Brockton, verbally threatened to accuse one Frank E. White of having committed the crime of burning a building not his own, with intent to extort money, namely, the sum of $100, from the said Frank E. White.

At the trial in the Superior Court, before *Thompson*, J., it was proved, but the attention of the judge was not called to the fact until after the commencement of the charge, that the name of the person referred to in the indictment as Frank E. White was Frank A. White, and not Frank E. White, and there was no evidence tending to show that said Frank A. White had ever been known or called Frank E. White, until so designated in this indictment. The defendants asked the judge to rule that there was a variance between the allegations in the indictment and the proof, and that, by reason of said variance, the jury should return a verdict of not guilty.

The judge stated that the point was too important to be left in doubt, and allowed said White to be recalled and to testify that his name was Frank A. White.

The judge refused to rule as requested; but ruled that, if the jury were satisfied that Frank A. White was the person called Frank E. White in the indictment, there was no variance, as contended by the defendants.

The jury returned a verdict of guilty against both defendants; and they alleged exceptions.

J. M. Day & T. C. Day, for the defendants.

A. J. Waterman, Attorney General, for the Commonwealth.

HOLMES, J. The name of the person threatened is necessary to the identity of the offence charged in the indictment, and

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therefore must be proved as set forth. *Commonwealth* v. *Mehan*, 11 Gray, 321. It is settled in this Commonwealth that a middle name or initial is part of the name, and a variance in regard to it is fatal. *Commonwealth* v. *Perkins*, 1 Pick. 388. *Commonwealth* v. *Hall*, 3 Pick. 262. *Commonwealth* v. *Shearman*, 11 Cush. 546. *Commonwealth* v. *McAvoy*, 16 Gray, 235. *Terry* v. *Sisson*, 125 Mass. 560, 561. The ruling that there was no variance if Frank A. White was the person called Frank E. White in the indictment, probably went upon the ground that the E. might be rejected as surplusage, as is held in some States. It cannot be said, as matter of law, that A. and E. are the same. There was no evidence that the party was ever called Frank E. White, as in *Commonwealth* v. *O'Hearn*, 132 Mass. 553. See also *Commonwealth* v. *Gormley*, 133 Mass. 580. *Exceptions sustained.*

COMMONWEALTH *vs.* CHESTER A. HINDS.

Franklin. Sept. 20. — Oct. 21, 1887. C. ALLEN & HOLMES, JJ., absent.

A warrant to search for and seize intoxicating liquors, issued under the Pub. Sts. c. 100, § 30, in the form prescribed by § 46, may be executed in the night-time.

INDICTMENT for an assault upon one Jillson, a constable of Orange.

At the trial in the Superior Court, before *Brigham*, C. J., there was evidence that Jillson, a constable of Orange, with a search-warrant, issued under Pub. Sts. *c.* 100, § 30, and in the form prescribed by § 46, entered the building described in the warrant, occupied by the defendant as a dwelling-house and a saloon, and there, at about nine o'clock in the evening of January 18, 1887, made search for intoxicating liquors alleged in the warrant to be kept for sale in violation of law; that in a closet in said building Jillson found a bottle partially filled with rum, which he seized and put into his pocket; that the defendant, while Jillson was continuing his search in the building, laid his hand upon said Jillson's person, snatched from Jillson's pocket

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this bottle, containing rum, and after a struggle carried away the same.

The defendant asked the judge to rule as follows: "1. The evidence will not warrant a verdict of guilty. 2. The search of the premises occupied by the defendant, in the night-time, was unauthorized by the warrant, and Jillson became a trespasser in so doing, and the defendant could rightfully retake from him his property, if in so doing he used no greater force than was reasonably necessary. 3. The warrant in this case did not authorize Jillson to search the premises of the defendant in the night-time; and Jillson, in so doing, was a trespasser, and the defendant could rightfully retake his property, if in so doing he used no more force than was reasonably necessary."

The judge refused to rule as requested. The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. A. Aiken, for the defendant.

E. J. Sherman, Attorney General, for the Commonwealth.

W. ALLEN, J. The only question presented by these exceptions is, whether a warrant to search for and seize intoxicating liquors, issued under the Pub. Sts. *c.* 100, § 30, in the form prescribed by that statute, can be executed in the night-time. The argument for the defendant is, that there is no express authority in the statute to execute the warrant in the night-time; and that by the common law and by the statute, when no express provision is otherwise made, a search-warrant can be executed only in the day-time.

The only search-warrant known to the common law was to search for stolen goods. The usual direction of it was to search in the day-time. Whether, at common law, a warrant which directed a search not limited to the day-time would be valid, and whether such a warrant could be executed in the night-time, it is not necessary to consider. See Dane Ab. *c.* 217, art. 2; D. Davis's Justice, (2d ed.) 30, 51, 147; 2 Hale P. C. 113; Burn's Justice, Search-Warrant; 3 Williams's Justice, 861. The warrant in question was not a common law search-warrant, and its validity and effect must be determined by the statute.

The Revised Statutes first made provisions in regard to the form of search-warrants. Before that, there was no statute

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relating to the common law search-warrant; but there were statutes authorizing warrants to search for counterfeit money, &c. (St. 1823, *c.* 40); for gunpowder in certain cases (St. 1828, *c.* 62); and to enter a gaming-house (St. 1834, *c.* 172). The Rev. Sts. *c.* 142, made general provisions in regard to search-warrants. Section 1 authorized warrants to search for property stolen, embezzled, or obtained by false pretences. Section 2 authorized search-warrants in four other specified cases. Section 3 provided for the form of the warrant, among other things, that it should command a search in the day-time. Section 4 provided for the manner in which a warrant might be issued authorizing a search in the night-time. The Commissioners, in their note, give as the reason for recommending this section, that, "By the common law, and the established practice in this State, a search-warrant was always required to be executed in the day-time. And this requirement has, in many cases, rendered it almost useless, as an instrument for the detection of offenders." This is the origin of the provisions which have ever since been in force, and which appear in the Gen. Sts. *c.* 170, §§ 1–4, and in the Pub. Sts. *c.* 212, §§ 1–4. Section 1 of the Pub. Sts. *c.* 212, provides that a warrant may issue to search for property stolen, embezzled, or obtained by false pretences. Section 2 authorizes search-warrants in seven different cases. Section 3 provides that "All search-warrants shall be directed to the sheriff of the county or his deputy, or to a constable, commanding such officer to search, in the day-time, the house or place," &c. Section 4 provides that, if there is satisfactory evidence that anything "for which a search-warrant may be issued by the provisions of this chapter" is concealed, &c., in a particular house or place, a warrant may be issued by two trial justices, or by a police, district, or municipal court, to authorize a public officer to search such house or place in the night-time.

The Revised Statutes, and various statutes enacted since, authorize the issuing of search-warrants, or of warrants in the nature of search-warrants, in cases which were not included in the chapter on search-warrants. Whether in a case of that kind the general rule that warrants can be served in the night-time, or the rule applied by the general statute to search-warrants, that they shall authorize a search only in the day-time, shall

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apply, must depend upon the terms and construction of each statute. It is a question as to the intention of the Legislature in each case. It will be observed that § 4 of the chapter on search-warrants is limited to warrants issued under that chapter, and cannot apply to a warrant issued under any other statute. The authority to execute a warrant in the night-time, and to issue a warrant in which the authority to execute it is not limited to the day-time, must be found in the statute which authorizes the warrant. Such authority will be inferred, unless the statute expressly or impliedly limits it to the day-time.

We think such authority is found in the statute under which the warrant in the case at bar was issued. Pub. Sts. *c.* 100, § 30. It does not, like *c.* 58, § 4, provide that the warrant shall be directed and executed as provided in *c.* 212, § 3; nor, like *c.* 207, § 57, that no search shall be made after sunset unless specially authorized; nor, like *c.* 207, § 60, require that a warrant shall be issued to search at any hour of the day or night; but it contains full and explicit provisions, even prescribing a form of the warrant, excluding the inference that it is governed by § 3 of *c.* 212, and that the execution of the warrant under it is limited to the day-time. Its provisions differ in every particular from those of *c.* 212, § 3. The direction of the warrant, instead of to the sheriff or his deputy, or constable, is to be to the sheriff, deputy sheriff, city marshal, chief of police, deputy chief of police, deputy marshal, police officer, or constable. There are particular provisions, not contained in § 3, as to the description in the warrant of the place to be searched, and special provisions as to authorizing the search of dwelling-houses. The warrant is to command the officer to search the premises, and to keep the property found until final action, and to return his warrant to the court, instead of to search in the day-time, and to bring the property and the person in whose possession it is found before the court; and the warrant itself, in the form prescribed by the statute, is to "forthwith enter the herein described, and make diligent and careful search," instead of to search in the day-time. The general rule is, that process, civil or criminal, can be as well served in the night-time as in the day-time; and a direction in a warrant to serve it, without limitation as to the hour of the day, is a direction to serve it in the night-time as

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much as in the day-time. The intention of the Legislature to authorize the execution of the warrant in the night-time is shown by providing for and by prescribing a direction in the warrant which includes that, instead of the direction to search in the day-time, which it required in the ordinary search-warrant.

Since the St. of 1852, *c.* 322, these provisions have been the subject of careful scrutiny, and have been enacted no less than five times. St. 1855, *cc.* 215, 397. Gen. Sts. *c.* 86. St. 1869, *c.* 415. St. 1876, *c.* 162. Pub. Sts. *c.* 212. The repetitions emphasize the intention manifested in the statute.

The intention that there should be authority to execute the warrant in the night-time might also be shown by the purpose and the particular provisions of the statute, and by its history, and the history of other statutes authorizing searches and seizures. But the considerations already presented are sufficient, and render further discussion unnecessary.

Exceptions overruled.

EBEN H. SPRING *vs.* FREEMAN S. HAGER & another.

Franklin. Sept. 20. — Oct. 21, 1887. C. ALLEN & HOLMES, JJ., absent.

If a guest at an inn, upon retiring for the night, locks the door of his room, but omits to fasten it with a bolt, such omission, if the existence of the bolt is unknown to him, and his attention is not called to it by the innkeeper, is not such negligence as will preclude him from maintaining an action against the innkeeper for the value of his property stolen from the room during the night.

TORT against the keepers of an inn, called the Elm House, in Greenfield, for the value of a watch, chain, and a sum of money, alleged to have been stolen while the plaintiff was a guest at the inn. Trial in the Superior Court, before *Barker*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff, who was a grain-dealer, about fifty years of age, and lived in Erving, came to Greenfield to attend court, as one of the grand jurors. On the first day of court, at noon, he registered as a guest at the Elm House, having on his person a gold watch of the value of about $100, and a gold watch-chain of the

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value of about $40. The watch was carried in the watch pocket of his waistcoat, and the chain was attached to the waistcoat; and he had in the pocket of his trousers $15 or $20 in money. It was admitted by the defendants, at the trial, that the watch and chain were articles worn or carried on the person, and were reasonable in value and amount, and that the money was for travelling expenses and personal use.

On the evening of that day, about half-past nine, the plaintiff was shown to his room by one of the defendants, who left with the plaintiff a glass kerosene lamp, such as is commonly used in country hotels. There was no gas or other light in the room. On the walls of this room were a large number of pictures of noted singers and actresses and performers, such pictures as are distributed for advertisements. The room was about ten feet wide and fifteen feet long, and had but one door. The plaintiff took the lamp from said defendant, and, as soon as the defendant left, closed the door and locked it, but did not bolt it. The lock was a common mortise lock connected with the door knob. After locking his door, the plaintiff looked at the pictures on three sides of the room, and prepared to retire. His waistcoat, with the watch in it and the chain attached, he laid upon a light stand on the farther side of the bed from the door, and near the head of the bed; his trousers containing the money he laid upon a chair, and retired. When he awoke in the morning, it was found that, during the night, the lock on the door had been picked, the room entered, and the trousers and waistcoat carried away by some person unknown. The waistcoat was soon found in the hallway, and the trousers were found in the street at some distance from the hotel, and the watch and chain and the money had been stolen. The door to the room was found to be slightly open.

It appeared that there was a bolt on the inside of said door, about six inches from the top. This bolt was about four inches long and one half-inch in diameter. The door was about six feet six inches high, and opened into the room. The plaintiff did not fasten the door with this bolt, and his attention was not called by the defendants or by any one else to the bolt; and he testified that he did not know it was there until after the robbery.

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One of the defendants testified that the plaintiff told him, the day following the plaintiff's loss, that he, the plaintiff, did not bolt said door, that he did not think of it; and another witness, called by the defendants, testified that the plaintiff said, on the same occasion, that he did not see said bolt. The plaintiff denied that he made either of these statements.

The plaintiff testified, on cross-examination, that he had travelled considerably, and had stopped at hotels on numerous occasions; and that his habit had always been on such occasions, when there were both a bolt and a lock upon the door of his room, to use both the bolt and the lock.

The defendants contended that, upon the evidence, the plaintiff must have seen the bolt; that the plaintiff's loss was attributable to his failure to bolt the door in addition to locking it; and that such failure was such negligence on his part as to exonerate the defendants from liability to the plaintiff. There was no contention on the part of the defendants that there was any negligence on the part of the plaintiff except his failure to bolt the door.

The plaintiff requested the judge to instruct the jury as follows: "1. The plaintiff having locked the door of his room, his failure also then to bolt the door was not such negligence on his part as would preclude his recovery in this action. 2. The failure of the plaintiff to bolt the door of his room after having locked it, if said bolt was not known to the plaintiff, nor his attention in any way called to the same, was not negligence on his part, and will not preclude the plaintiff from recovery in this action."

The judge declined to give the instructions requested, but submitted to the jury, as a question of fact for them to determine, whether the failure of the plaintiff to bolt his door in addition to locking it was negligence on his part to which the loss was attributable, with appropriate instructions, not objected to, defining negligence on the part of the plaintiff, and its effect on the case.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

C. C. Conant & S. D. Conant, for the plaintiff.

J. A. Aiken, for the defendant.

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FIELD, J. The only negligence of the plaintiff which the defendants contended that the evidence proved, was the neglect of the plaintiff to bolt the door. The plaintiff locked the door by a lock connected with the door knob. The bolt was on the inside of the door, six inches from the top, and the door was "about six feet and six inches high." The plaintiff testified that "he did not know it was there until after the robbery." It does not appear that there were any regulations of the inn, which were posted in the room or anywhere else, or which were in any manner brought to the notice of the plaintiff, and it is conceded that the attention of the plaintiff "was not called by the defendants or by any one else to the bolt." The defendants contended, however, upon all the evidence, that "the plaintiff must have seen the bolt." The first request of the plaintiff for a ruling was, in effect, that his failure to bolt the door after having locked it was not such negligence as would defeat the action, even if he saw the bolt; and the second request was, in effect, that his failure to bolt the door after having locked it would not defeat the action, "if said bolt was not known to the plaintiff, nor his attention in any way called to the same." This second request raises the question whether it was the duty of the plaintiff to examine the door to see if there were other fastenings upon it besides the lock. It may be conceded that the bolt and lock together afforded greater security than either of them alone, and that, although the bolt was in an unusual place upon the door, it could easily have been seen if the plaintiff had searched for it.

The Pub. Sts. *c.* 102, § 16, provide that "An innholder against whom a claim is made for loss sustained by a guest may in all cases show that such loss is attributable to the negligence of the guest himself, or to his non-compliance with the regulations of the inn, if such regulations are reasonable and proper, and are shown to have been duly brought to the notice of the guest by the innholder." This provision was first enacted in the St. of 1853, *c.* 405, § 3, which was soon after the decision in *Berkshire Woollen Co.* v. *Proctor*, 7 Cush. 417; and, although this statute made some changes in the law, the clause that it is competent for an innkeeper to show that the loss is attributable to the negligence of the guest is only declaratory of the common law.

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Mason v. *Thompson*, 9 Pick. 280. *Berkshire Woollen Co.* v. *Proctor*, *ubi supra*. *Elcox* v. *Hill*, 98 U. S. 218. *Oppenheim* v. *White Lion Hotel Co.* L. R. 6 C. P. 515. *Cashill* v. *Wright*, 6 El. & Bl. 890. *Morgan* v. *Ravey*, 6 H. & N. 265.

It has indeed been said that, "in the absence of notice of a rule of the inn to lock and bolt the door, the failure to do so is not legal negligence at common law." *Murchison* v. *Sergent*, 69 Ga. 206, 213. It has been often decided that not locking or fastening the door of a bedroom is not, as matter of law, negligence, but that this fact, in connection with others, may be evidence of negligence for the jury; and the weight of modern authority is, we think, that the failure to lock or bolt the door of a lodging-room at an inn, when there is a lock or bolt upon it, is evidence of negligence for the jury. *Oppenheim* v. *White Lion Hotel Co.*, *ubi supra*. *Spice* v. *Bacon*, 36 L. T. (N. S.) 896. *Herbert* v. *Markwell*, 45 L. T. (N. S.) 649.

At common law, "inn-keepers, as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God, or the common enemy, or the neglect or fault of the owner of the property." *Mason* v. *Thompson*, 9 Pick. 284.

The statutes have not changed the general nature of the liability of an innholder; and, subject to the statutory provisions, he is liable to his guests in cases where no actual negligence on the part of himself or his servants is shown. It has been held that the burden of proof is upon the innholder to show that the loss was caused by the negligence of his guest. *Norcross* v. *Norcross*, 53 Maine, 163. The language of the Pub. Sts. *c.* 102, § 16, implies that this burden is upon the innholder. The case at bar is not, therefore, an action for negligence, and it may be doubted whether the rulings in such actions upon evidence of contributory negligence are in all respects applicable.

No case has been cited in which it has been held that the single fact that the plaintiff did not bolt his door, after having locked it on the inside, is sufficient evidence of negligence.

In *Spice* v. *Bacon*, and in *Herbert* v. *Markwell*, *ubi supra*, the jury must have found that the door was left unfastened either by bolt or lock.

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In *Morgan* v. *Rarey*, 2 F. & F. 283, it is said that the plaintiff locked the door, but did not bolt it. In the same case, in the Court of Exchequer, 6 H. & N. 265, 266, it is said that "witnesses were, however, called, on the part of the defendants, to prove that the plaintiff had told them he had not locked the door." It was admitted that he did not use the bolt. There was a notice posted over the mantel-piece requesting "all visitors to use the night bolt," which the plaintiff admitted he saw, but said he did not read beyond the word "notice." Chief Baron Pollock, at *nisi prius*, left the question of negligence to the jury, but told "them at the same time that the guest was not bound to lock his bedroom door, &c." The verdict was for the plaintiff.

It must often depend much upon the circumstances of the case, the customs of the age and country, and the usages of the place, whether the plaintiff has been guilty of such negligence that the loss can be said to be attributable to it; and we cannot say, as matter of law, that, on the facts appearing in this case, if the plaintiff saw the bolt and did not use it, this was not some evidence of negligence to be submitted to the jury. The delivery of a key to a guest may be held to be an intimation to him that he is to use it in locking his door. The lock, however, is the only fastening which the guest can use when he is not in the room. A bolt, if seen, may itself suggest that it ought to be used. If, however, there are no regulations brought to the notice of a guest requesting him to bolt the door, and if it is not known to the guest that there is a bolt, and his attention is not in any way called to it, we are of opinion that the fact that, after locking his door with the key, he does not search for a bolt and find it, is not evidence of negligence on his part, and that the second ruling requested should have been given. See *Murchison* v. *Sergent*, *ubi supra*; *Batterson* v. *Vogel*, 10 Mo. App. 235.

Exceptions sustained.

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EMORY A. SQUIRES *vs.* INHABITANTS OF AMHERST.

Hampshire. Sept. 20. — Oct. 21, 1887. C. ALLEN & HOLMES, JJ., absent.

A written instrument, given to a selectman of a town by a person who has been injured in his person and property by reason of a defect in a highway in the town, and reciting the receipt from such selectman, for the town, of a certain sum "in full for all demands for damages sustained on the highway," is a bar to an action by such person against the town for his personal injuries; and oral evidence is inadmissible, in the absence of fraud, to show that he understood the sum paid as intended in settlement of the damage to his property only, and that it was agreed between him and the selectman that, if it appeared that he had been injured in his person, he should be paid something more.

TORT for personal injuries occasioned to the plaintiff by a defect in a highway in Amherst. Answer: 1. A general denial. 2. Accord and satisfaction. Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff testified that he received personal injuries, and that damage was done to his horse, wagon, and harness, on the evening of December 31, 1885, by the horse and wagon going off the end of a culvert, by reason of the lack of a railing on a way in the defendant town, which it was bound to keep in repair.

On cross-examination, the plaintiff testified that, the morning after the injury, he went to see one Stone, who was a selectman of Amherst, about the accident; that they went together to the place where the accident occurred; that Stone said to the plaintiff, "You want to get your wagon repaired, I suppose, and are you hurt?" that the plaintiff replied that he felt rather lame and sore; that Stone said perhaps it was only a cold, and asked the plaintiff how much he would take to settle; that the plaintiff said he would take $50, and make it all even; that Stone said he should never pay that, as long as the plaintiff was not injured himself, and it would not take $50 to make the repairs; that the plaintiff replied that, if he was not injured, he wanted nothing, except for the repairs; that Stone said he guessed it was a cold only; that the plaintiff said, if he was not injured, he would be willing to take that, as he wanted only what was

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right of the town; that Stone said, if the plaintiff was injured, he was ready to do what was right; that the plaintiff was to be paid, according to the talk, $10, and if he was injured, was to be paid what was right; that Stone said he would pay more if the plaintiff was injured, wrote the following receipt, and read it, and the plaintiff signed it: "Received of F. L. Stone, for the town of Amherst, ten dollars in full for all demands for damage sustained on the highway near the house of Alden Cooley, on the evening of December 31, 1885." The plaintiff could not say that he read it just as it was written, and could not say that he did not, but it had in it all demands for damages, but nothing about personal injuries, and he did not understand that it covered them.

The plaintiff also testified that he signed it, because Stone agreed to pay him more if he was injured; that he could read it himself; that Stone estimated what the repairs would cost, and that it would be less than $10; that the plaintiff would have something left of the $10 for his trouble, and that he took out $10 from his pocket, and handed it to the plaintiff, who took it; and that the cost of said repairs was in fact about three dollars.

The judge asked the plaintiff's counsel if he contended that there was any fraud in procuring this writing. The plaintiff's counsel replied that he did not, but did contend there was a mistake about the writing; that the minds of the parties did not meet on the proposition that there was a settlement of any claim for personal injuries, or any other than for the property damage; that there was a distinct understanding and agreement that the plaintiff was to be paid more if he was injured in his person, at the time the writing was signed; and that it did not express the understanding of the plaintiff.

The plaintiff's counsel had stated in his opening that he should ask for damages for personal injuries only. After about five days from the injury, the plaintiff was taken quite sick, as he testified in chief, and suffered much in his back, head, and stomach as a result of his being thrown down the bank, and was disabled for a considerable time.

It was conceded that the town had ratified the act of said Stone as a settlement, at a town meeting, by accepting the selectmen's report describing such settlement.

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The plaintiff offered to show by the above testimony, and other evidence of the same kind, and by his own testimony, that he did not understand that he was settling for personal injuries, and that the writing was procured by mistake; and claimed the right to go to the jury on that question, and on the whole case. But the judge ruled that the writing could not be thus controlled, and directed a verdict for the defendant. The plaintiff alleged exceptions.

W. G. Bassett, for the plaintiff.

D. W. Bond, for the defendant.

FIELD, J. In an action at law in this Commonwealth, the written paper put in evidence by the defendant is regarded not only as a receipt acknowledging the payment of money, but as an agreement that the money is received in full payment of all demands for damages sustained by reason of the defect in the highway complained of; and, so far as the written paper contains an agreement, it cannot be varied or controlled by evidence of an oral agreement made contemporaneously with it, and inconsistent with its terms. *Brown* v. *Cambridge*, 3 Allen, 474. *Curley* v. *Harris*, 11 Allen, 112. *Goss* v. *Ellison*, 136 Mass. 503. *Leddy* v. *Barney*, 139 Mass. 394. *Osborn* v. *Martha's Vineyard Railroad*, 140 Mass. 549.

It was not contended by the plaintiff, at the trial, "that there was any fraud in procuring this writing," which at common law would avoid it, and the plaintiff has not attempted to rescind the agreement by restoring the money he has received. The contention is, that there was a mistake, in this, that the plaintiff understood that the receipt covered only the claim for damages to his property, and did not include the claim for damages to his person, and that there was a distinct agreement between the plaintiff and Stone that the plaintiff should be paid something more if it appeared that he had been injured in his person. The agreement contained in the receipt is unambiguous, and clearly covers all demands for damages, whether to person or property; the oral agreement which the plaintiff offered to prove is plainly inconsistent with the writing, and a mistake or misunderstanding on the part of the plaintiff of the legal import of the written agreement is not a ground for avoiding it at common law.

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We need not decide whether the evidence offered would have been competent, if the plaintiff had intended to avail himself of his equitable rights pursuant to the St. of 1883, *c.* 223, § 14. It does not appear that the evidence was offered, or that the exceptions were taken, with reference to the rights conferred by this statute upon plaintiffs in actions at law.

Exceptions overruled.

QUINCY A. SEWARD *vs.* GILBERT W. ARMS & trustee.

Hampshire. Sept. 20. — Oct. 20, 1887. C. ALLEN & HOLMES, JJ., absent.

In a trustee process, if it appears from the trustee's answers that the trustee owes for washing done by the wife of the defendant under a contract made by the trustee with him, and that the trustee is informed and believes that the defendant, in making the contract, acted as the agent of his wife, and the plaintiff rests his case wholly upon the trustee's answers, the trustee is rightly discharged.

TRUSTEE PROCESS. Smith College, a corporation duly established by law in this Commonwealth, was summoned as trustee of the principal defendant. The material parts of the trustee's answers appear in the opinion. The Superior Court discharged the trustee; and the plaintiff appealed to this court.

C. G. Delano, for the plaintiff.

W. G. Bassett, for the trustee.

FIELD, J. To charge the corporation, which is the alleged trustee in this case, it must affirmatively appear from its answers that it has credits of the defendant in its hands. *Porter* v. *Stevens*, 9 Cush. 530. It appears from these answers that the trustee is indebted for washing done by the wife of the defendant; that the contract for the washing was made by it with the defendant; but that it is informed and believes that the defendant, in making the contract, acted as the agent of his wife, and that it understands that the indebtedness is to the wife. By the Pub. Sts. *c.* 147, § 4, this work of doing washing by the wife for a person other than her husband and

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aintiff offered to show by the above testimony, and
dence of the same kind, and by his own testimony, that
ot understand that he was settling for personal injuries
the writing was procured by mistake; and claimed th
go to the jury on that question, and on the whole ca
judge ruled that the writing could not be thus c
and directed a verdict for the defendant. The plai
exceptions.

. Bassett, for the plaintiff.

. Bond, for the defendant.

D, J. In an action at law in this Commonwe
paper put in evidence by the defendant is reg
s a receipt acknowledging the payment of mo
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y v. *Harris*, 11 Allen, 112. *Goss* v. *E*
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his equitable [illegible]n, J., at the close of the testimony,
does not [illegible]e judge to rule that there was no
ception [illegible]ion of the jury, that the damage or
this statute [illegible]revented by reasonable care and dili-
[illegible]defendant, or that the defendant had
[illegible]efect, or might have had notice thereof
[illegible] care and diligence. The judge declined

[illegible] verdict for the plaintiff; and the defend-
[illegible]. The nature of the evidence appears in

Question [illegible]

[illegible]r the defendant.

Hampden [illegible] the plaintiff.

[illegible] The case assumes that a defect in the side-
In a [illegible]ry to the plaintiff. The only questions raised
for [illegible]re was any evidence that the defendant had
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[illegible] and diligence on the part of the defendant, so as
[illegible] defendant liable under the Pub. Sts. c. 52, § 18.
[illegible] was the existence and condition of ice on the side-
[illegible] was evidence from which the jury might have
[illegible] ice was in substantially the same condition at the
[illegible]njury that it was in when formed immediately after
[illegible] storm of snow and rain which occurred at some time
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[illegible]hat, as was argued to them by the plaintiff's counsel, these
[illegible]sses were mistaken, and that the storm occurred nearly a
[illegible]k before the time testified to by them.

The defendant contends that there was no evidence that the injury to the plaintiff was caused by the general rough and uneven condition of the ice, or by any defect except the particular one described by the plaintiff as a hole in the ice, and that there was no evidence that that particular defect had existed for any

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children must, "unless there is an express agreement on her part to the contrary, be presumed to be performed on her separate account." It may be, that, if the trustee and the defendant agreed together that the defendant should have this washing done, and the husband employed his wife to do it, this would tend to show that she was working for her husband, and that the trustee was indebted to the husband. But the answers of the trustee, upon information and belief, that the husband, in making the contract, acted as agent of the wife, must, in the absence of any other evidence, be taken to be true. *Fay* v. *Sears*, 111 Mass. 154, 156. *Clinton National Bank* v. *Bright*, 126 Mass. 535.

The question does not arise whether the plaintiff might not have alleged and proved that the defendant made the contract on his own account, Pub. Sts. *c.* 183, § 17, or whether the wife might not have been summoned in as a claimant, and this issue tried upon evidence produced by the plaintiff and the claimant. The plaintiff rested his case against the trustee wholly upon its answers. See *Mortland* v. *Little*, 137 Mass. 339; *Sheehan* v. *Marston*, 132 Mass. 161. The judgment discharging the trustee must be *Affirmed.*

JOSEPH A. FORTIN *vs.* INHABITANTS OF EASTHAMPTON.

Hampshire. Sept. 20. — Oct. 21, 1887. C. ALLEN & HOLMES, JJ., absent.

In an action against a town for personal injuries occasioned to the plaintiff by a defect consisting of ice on the sidewalk of a street, there was evidence that the ice was in substantially the same condition at the time of the injury that it was in immediately after a storm of snow and rain occurring nine days before; that the sidewalk was a frequented one, and was during that time patrolled by a police officer and several times passed by a selectman; and that an attempt to clear the sidewalk, which left it in the condition testified to, was made before the ice was fully formed and more than a week before the injury. *Held*, that the defendant was not entitled to a ruling that there was no evidence for the consideration of the jury that the injury might have been prevented by reasonable care and diligence on the part of the defendant, or that the defendant had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence.

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TORT for personal injuries occasioned to the plaintiff by a defect in a highway in Easthampton. At the trial in the Superior Court, before *Knowlton*, J., at the close of the testimony, the defendant requested the judge to rule that there was no evidence for the consideration of the jury, that the damage or injury might have been prevented by reasonable care and diligence on the part of the defendant, or that the defendant had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence. The judge declined so to rule.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The nature of the evidence appears in the opinion.

W. G. Bassett, for the defendant.

D. W. Bond, for the plaintiff.

W. ALLEN, J. The case assumes that a defect in the sidewalk caused injury to the plaintiff. The only questions raised are, whether there was any evidence that the defendant had notice of the defect; and whether there was any evidence that the defect might have been remedied, or the injury prevented, by reasonable care and diligence on the part of the defendant, so as to render the defendant liable under the Pub. Sts. *c.* 52, § 18.

The defect was the existence and condition of ice on the sidewalk. There was evidence from which the jury might have found that the ice was in substantially the same condition at the time of the injury that it was in when formed immediately after a particular storm of snow and rain which occurred at some time before the injury. The plaintiff and several witnesses called by him testified that the storm was on the Sunday before he was injured, which was on a Wednesday. But there was other evidence from recorded observations, which might have satisfied the jury that, as was argued to them by the plaintiff's counsel, these witnesses were mistaken, and that the storm occurred nearly a week before the time testified to by them.

The defendant contends that there was no evidence that the injury to the plaintiff was caused by the general rough and uneven condition of the ice, or by any defect except the particular one described by the plaintiff as a hole in the ice, and that there was no evidence that that particular defect had existed for any

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considerable length of time. But we think that the jury would have been authorized to find that the attempt to clear the sidewalk, which left it in the condition testified to by the plaintiff, was made before the ice was fully formed, and more than a week before the injury to the plaintiff.

The jury may have found that the defect which caused the injury had existed for nine days in a frequented sidewalk, which during that time was patrolled by a policeman and several times passed by a selectman. Clearly these facts afford evidence of notice of the defect and of negligence in not remedying it.

Exceptions overruled.

JOSEPH STEELE & another *vs.* H. E. NASH & others.

Hampden. Sept. 27. — Oct. 21, 1887. C. ALLEN & HOLMES, JJ., absent.

A., a creditor of C., brought an action against him, and attached his goods. B., another creditor of C., had attached his goods on a writ prior to A.'s attachment, and had recovered judgment. Before execution issued on said judgment, A. threatened to begin proceedings in insolvency against C. Thereupon B. agreed that if, after demand made by A. upon B., after the sale upon said execution of all the property attached in said action, and after the money realized upon such sale should have passed into the hands and possession of B., he should refuse to pay to A. one half of the amount which B. should have realized upon said execution, after all the costs and fees arising from and by reason of said action and said execution should have been deducted, then D. might indorse to A. a certain promissory note made by B. to D., and not otherwise. A. did not institute insolvency proceedings against C B.'s attachment was perfected, the attached property was sold, and a certain sum realized; and B, upon request, refused to comply with his agreement with A. Subsequently, and while the proceeds of said sale were in the hands of the officer, the assignee in insolvency of C. brought a bill in equity against B. and the officer to avoid B.'s judgment and to recover the proceeds of the sale, and the officer was restrained from paying them to B. That suit was compromised by the payment of a part of the proceeds to the assignee, and the balance was paid to B.'s attorney in payment of costs and fees in said suits. A. then brought a bill in equity against B. and D. to enforce said agreement. *Held*, that the contingency on which the note was to be indorsed to A. had not arisen; and that the bill could not be maintained.

BILL IN EQUITY, by Joseph Steele and Alexander Emery, copartners under the firm name of Steele and Emery, against H. E.

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Nash and N. C. Cook, copartners under the firm name of H. E. Nash and Company, and John G. Mackintosh. The case was referred to a master, who reported the following facts:

The plaintiffs, on September 4, 1882, were creditors of one John Bobsin, of Holyoke, and had brought an action against him, which is now pending, in which an attachment of his goods had been made. The defendants Nash and Cook were also creditors of Bobsin, and had caused his goods to be attached on two writs returnable to the Police Court of Holyoke prior to the attachments on the plaintiffs' writ, and on said September 4 recovered judgment in these actions, in one for the sum of $216.70, and in the other for $225.80. After said judgments were recovered, and on the same day, and previously to the issuing of executions on said judgments, the plaintiffs threatened to commence proceedings in insolvency against Bobsin, and the defendants promised and agreed that they would pay to the plaintiffs the sum of $200, or one half the amount which they should realize upon the executions which might issue upon said judgments, after all the costs and fees arising from and by reason of said suits and said executions should have been deducted, which sum was to be determined by the defendants. As security for the performance of said agreement, the defendants made a promissory note for $200, dated September 4, 1882, payable thirty days after date to the order of John G. Mackintosh, the other defendant, and signed "H. E. Nash & Co."

Accompanying the note was the following statement, signed by the plaintiffs and by H. E. Nash and Company: "The note which is attached hereto is given to John G. Mackintosh, to be held by him upon the following terms, and for the following purposes, to wit: if said H. E. Nash and Company, the signers of said note, shall pay to Steele and Emery one half the amount which they shall hereafter realize, over and above the fees and costs upon the executions which may hereafter issue in the two suits which are now pending in the Police Court of Holyoke, and which H. E. Nash and Company have brought against John Bobsin, the said note shall be returned to said H. E. Nash and Company by said Mackintosh. But if, upon demand therefor made by said Steele and Emery, said H. E. Nash and Company, after the sale upon said executions of all

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the property attached in said suits, and after the money realized upon such sales shall have passed into the hands and possession of said H. E. Nash and Company, they shall refuse to pay to the said Steele and Emery one half the amount which they, said Nash and Company, shall have realized upon said executions, after all the costs and fees arising from and by reason of said suits and said executions shall have been deducted, then said Mackintosh may indorse said note to said Steele and Emery, and not otherwise."

The plaintiff did not institute proceedings in insolvency against said Bobsin, and said attachments of the defendants were perfected and the property attached was sold by D. E. Kingsbury, a deputy sheriff for Hampden County, and the sum of $434.02 was realized. The defendants, although requested so to do, have refused to comply with the terms of said agreement. After said judgment had been perfected in said Police Court, but before sale and said executions, another creditor instituted proceedings in insolvency against Bobsin, and one claim of the plaintiffs for the sum of $429.93 was allowed; also one for the sum of $13.68, preferred for costs of the suit aforesaid, proof of said claims being made on the usual blanks, sworn to by the plaintiffs, and being for the full amount of their claim against Bobsin. From said insolvent estate the plaintiffs received and receipted for $46.77.

One Charles F. Rebstock, of Meriden, Connecticut, claims the goods sold under said executions, and, by writ dated July 21, 1883, brought an action against said deputy sheriff, D. E. Kingsbury, for the value thereof, which action is now pending in the Superior Court for the county of Hampden, but has never been placed upon the trial list.

William G. Ham, assignee of the estate of Bobsin, on January 22, 1883, filed a bill in equity in the Supreme Judicial Court for said county against these defendants, John Bobsin, and Kingsbury, praying that said judgments entered in the Holyoke Police Court be adjudged fraudulent and void, and that the proceeds of said sale be paid over to said assignee; and an injunction issued from said court restraining Kingsbury from paying any of the money received on said executions. The matters in controversy between the parties to said bill were compromised by

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the payment by Kingsbury to said Ham of the sum of $212 from the $434.02, the proceeds of the sale.

The balance of said $434.02, being the sum of $222.12, was paid to the attorneys of the defendants, Nash and Cook, in payment of costs and fees in the different cases growing out of the defendant's first-mentioned actions, and the executions issued thereon, including the equity proceedings above referred to.

The case was heard in the Superior Court, by *Knowlton*, J., who found that the defendants Nash and Cook made and delivered to the defendant Mackintosh, for the use and benefit of the plaintiffs, the note described in the bill, as stated in the memorandum attached thereto, for a sufficient consideration; that the property attached on the suits referred to was sold upon the executions which issued thereon, and the avails thereof came into the possession of the defendants Nash and Cook, who failed and refused to pay over to the plaintiffs any part thereof; and ordered that Mackintosh indorse said note to the plaintiffs, and deliver the same into court to be filed in this case; and that judgment be rendered against Nash and Cook for the amount of said note, and interest from the time the same became due, namely, $234.90. The defendants appealed to this court.

W. H. Brooks, for the defendants.

G. Wells, for the plaintiffs.

W. ALLEN, J. It is obvious from the facts stated in the master's report, that the parties supposed that the attachment of Nash and Company might be avoided under proceedings in insolvency. It does not appear whether they feared a statutory dissolution of the attachment by an assignment under proceedings commenced within four months after the attachment, or that it might be avoided by an assignee, as in fraud of creditors or of the insolvent law. The contract was made to protect the attachment from proceedings in insolvency. It was in view of the liability of the attachment to be dissolved by an assignment before the execution was levied, or avoided by a subsequent suit by an assignee, that the parties agreed that if, after the sale of the property upon the executions and after the money realized upon such sales should pass into the hands or possession of Nash and Company, they should refuse to pay to the plaintiff one half of the amount " which they, said Nash and Company, shall have

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realized upon said executions, after all the costs and fees arising from and by reason of said suits and said executions shall have been deducted, then said Mackintosh may indorse said note to said Steele and Emery, and not otherwise."

The parties were creditors seeking payment of their debts, and the fair construction of the agreement is, that whatever Nash and Company should realize to apply on their debt they would share with the plaintiffs.

After the sale of the property on execution, and while the proceeds were in the hands of the officer, a bill in equity was brought against Nash and Company and the officer, by the assignee in insolvency, to avoid the judgments of Nash and Company, and to recover the proceeds of the sales; and the officer was enjoined against paying them over to Nash and Company. That suit was compromised by the payment of a part of the proceeds to the assignee, and the balance was paid over by the officer to the attorneys of Nash and Company in payment of costs and fees in the equity suit, and in other cases growing out of the suits and executions upon which the property was sold, so that Nash and Company never received anything which they could apply on their debts against the insolvent. We think that the costs and fees in actions brought to avoid the judgments and to recover the proceeds of the sales on execution in the hands of the officer were "costs and fees arising from and by reason of said suits and said executions," within the meaning of the contract, and that neither the money received by the officer on the sales while it remained in his hands as officer, nor the money paid by the officer in compromise of the suit of the assignee, nor the money paid by the officer to the attorney of Nash and Company for costs and fees incurred in the suit by the assignee, and in similar suits brought to recover the proceeds of the sales from the officer, was money realized upon such sales in the hands and possession of Nash and Company, within the meaning of the contract.

This decision renders it unnecessary to consider the question whether there was any legal consideration for the note, and we express no opinion upon it.

In the opinion of a majority of the court, the entry must be,

Bill dismissed.

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GEORGE W. BARBER *vs.* HENRY S. PARSONS.
SAME *vs.* JOSEPH WELCH.
SAME *vs.* HENRY W. CROCKER.

Hampden. Sept. 27. — Oct. 21, 1887. C. ALLEN & HOLMES, JJ., absent.

Three actions of slander were brought by the same plaintiff against three different defendants for the same or similar defamatory words; and, by agreement of parties, they were referred to the same referee, who heard them together on three consecutive days, and made an award in each case in favor of the defendant, on which judgment was entered. The certificate of witnesses filed in each case showed that the same witnesses for the defendants attended in each case the same number of days and travelled the same number of miles, with a trifling exception. *Held*, that the fees for the attendance of witnesses should be taxed in all the cases, but that the fees for their travel should be taxed only in the case in which they were summoned.

FIELD, J. These are three actions of slander brought by the same plaintiff against three different defendants for the same or similar defamatory words; and, by agreement of parties, they were referred to the same referee, who heard them together on the 15th, 16th, and 17th of December, 1886, and made an award in each case in favor of the defendant, on which judgment was entered. A certificate of witnesses has been filed in each case, from which it appears that the same twenty-seven witnesses for the defendants attended in each case the same number of days, and travelled the same number of miles, with a single exception. H. B. Lewis certifies in the first and second cases that he attended one day, and travelled twenty miles, and in the third case that he attended one day and travelled two miles. The number of days of attendance in each case is seventy-three. The number of miles of travel in the first and second cases is 1202, and in the third case 1184. The amount taxed for attendance in each case is $36.50. The amount taxed for travel in each of the first and second cases is $60.10, and in the third case $59.20, making the whole amount taxed for travel and attendance $96.60 in each of the first and second cases, and $95.70 in the third case, being at the rate of fifty cents a day for attendance, and five cents a mile for travel. Pub. Sts. *c.* 199, § 14.

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The principles which must govern these appeals are declared in *Miller* v. *Lyon*, 6 Allen, 514, and *Day* v. *Berkshire Woollen Co.* 1 Gray, 420. It must appear that the attendance of the witnesses "was reasonably and in good faith procured by the party making the taxation; and that they were paid, or actually attended, so as to be entitled to their fees." The certificates "are competent *prima facie* evidence for the allowance of the amount certified, but are not conclusive," and the court "may decide upon the reasonableness of the conduct of the party as to the number of witnesses, and the length of their attendance, in order to secure good faith, and prevent oppression or reckless expense." 6 Allen, 515. "If the witnesses were summoned, and attended and were paid in the different cases, their travel and attendance might be taxed in each." 1 Gray, 424.

It was said at the argument, and not denied, that the three defendants were represented by the same attorneys before the referee. The amount taxable in each case is the amount of the legal fees for witnesses in the case, which the defendant has paid or is under liability to pay. If the witnesses were summoned in but one case, their travel, we think, should be taxed only in that case, although the attorneys may have requested them to remain in attendance for all the cases. It is not necessary that a witness be summoned to entitle him to his fees: it is sufficient if he attends on request; but, when three cases are heard together, and the same attorneys are employed in each of the cases, and the witnesses are all summoned in but one case, they are not entitled to more than one travel merely because the officer who served the subpœnas on the witnesses requested them to attend for all the cases. There might, however, be such separate requests for travel and attendance as, if acted upon, would show separate contracts, and would entitle the witnesses to be paid for travel as well as attendance in each case. We infer, however, from the facts found in these cases, that there was no such request as entitles the witnesses to travel except in the case in which they were summoned. If the witnesses, having appeared in obedience to a subpœna, were requested to remain as witnesses in all the cases, we think they are entitled to be paid for attendance in each case while they attended as witnesses in that case, and that they might attend as witnesses in three cases.

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at the same time. It is a question of fact whether, while a witness remains in attendance, he is attending as a witness in all the cases, or in some one or more of them. If one case is tried before the trial of another is begun, the attendance of a witness should not be taxed in the former case after the trial is finished, nor ought it to be taxed in the latter for a length of time before the trial, which under all the circumstances should be thought unreasonable.

On the somewhat meagre facts found in the Superior Court, and regarding the certificates as *prima facie* evidence, we think that the fees for the attendance of witnesses should be taxed in all the cases, but that the fees for their travel should be taxed only in the case in which they were summoned. We infer from the copies of the taxation appearing in the papers, that the witnesses were summoned in the first case, which is that in which Henry S. Parsons is defendant. The order of the Superior Court in the taxation of costs in that case is affirmed. In the other cases, the order is reversed, the fees for the travel of witnesses are to be stricken from the bills of costs, and, when thus corrected, the taxation is to be affirmed. No costs are to be allowed on these appeals. *So ordered.*

J. J. Jennings, (of Connecticut,) for the plaintiff.

M. B. Whitney, for the defendants.

COMMONWEALTH *vs.* JOHN MALONEY.

Worcester. October 3. — 21, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A person arrested on a complaint for keeping and maintaining a tenement used for the illegal sale of intoxicating liquors was brought before the trial justice who issued the warrant, and pleaded guilty; and the case was continued for sentence to a day certain. On that day, the trial justice ordered the case to be continued *nisi* upon payment of costs by the defendant, to be again called up for sentence upon notice to the defendant. Subsequently, the case was called up on notice to the defendant, and he was sentenced, and took an appeal to the Superior Court. *Held*, that the continuance *nisi* was, under the Pub. Sts. c. 212, § 26, made without authority; that the subsequent sentence imposed was of no validity; and that these defences were open to the defendant in the Superior Court, on an appeal by him.

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COMPLAINT to a trial justice, for keeping and maintaining a certain common nuisance, to wit, a tenement in Leominster, used for the illegal sale and illegal keeping for sale of intoxicating liquors, on April 13, 1886, and on divers other days and times between that day and June 8, 1886.

The record showed that the defendant was arrested and brought before the trial justice on June 19, 1886, and pleaded not guilty; that the case was continued to June 26, 1886, at which time the defendant retracted his plea of not guilty, and pleaded guilty; that the case was "continued for sentence" to August 7, 1886, "at which time the cause was continued *nisi* upon payment of costs by the defendant, to be again called up for sentence upon notice to the defendant;" that on October 6, 1886, upon notice to the defendant, the case was called up for sentence, and continued to October 16, 1886, when the defendant was sentenced; from which sentence he appealed to the Superior Court.

In the Superior Court, upon motion for sentence, the defendant moved to dismiss the complaint for the following reasons: "1. Because the court has no jurisdiction, in that the record of the case discloses the fact that it was disposed of contrary to the St. of 1885, *c.* 359. 2. Because the trial justice, before whom the case was disposed of, had no power to continue *nisi*. 3. Because the trial justice had already accepted the costs in the case, as appears from the record. 4. Because, in accepting the costs as aforesaid, the trial justice has already imposed a sentence, which has been fully satisfied. 5. Because judgment cannot twice be entered on one and the same complaint. 6. Because the trial justice has no power to continue a criminal case for more than ten days."

Staples, J., overruled the motion; ruled that no legal obstacle existed to the award of sentence in the case; and reported the case for the determination of this court. If the motion to dismiss was rightly overruled, the case was to stand for judgment; otherwise, to be dismissed.

J. W. Corcoran, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

W. ALLEN, J. The defendant cannot, on appeal, take advantage of irregularities in the proceedings before the trial justice, unless they were such as to show that the magistrate had not

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jurisdiction to impose a sentence. If the trial justice had jurisdiction of the person of the defendant to sentence him upon the complaint, the appellate court had the same jurisdiction upon the appeal. *Commonwealth* v. *Holmes*, 119 Mass. 195, and cases cited. *Commonwealth* v. *Dunbar*, 15 Gray, 209. *Commonwealth* v. *Dillane*, 11 Gray, 67.

The record sufficiently shows that the defendant voluntarily appeared before the magistrate, and submitted to his sentence by appealing from it. Mere consent would not give jurisdiction over the person of the defendant. To make the voluntary appearance and submission show more than mere consent, it is at least necessary that the magistrate should have had power to compel the presence of the defendant. If the defendant could not have been arrested and held for sentence by any legal warrant or authority, the magistrate had no jurisdiction of his person, and could acquire none by consent.

If a magistrate has authority to order a party into custody, or to issue process to arrest him, the party can waive defects in process or service, perhaps can submit to the authority without process; but where there is no authority to arrest and hold a person, or to issue process for his arrest, he cannot by consent create such authority and give jurisdiction to hold and sentence him. The question in the case is, whether the magistrate could lawfully have had the defendant arrested and brought before him for sentence, either under the original warrant or on a capias. If he could not, and could not acquire jurisdiction of the person of the defendant by process, he could not by consent.

The record is very imperfect, but it shows that the defendant was arrested on the warrant and brought before the trial justice on June 19, and pleaded not guilty; that the case was continued to June 26, when the defendant retracted his plea and pleaded guilty, and the case was continued to August 7, when the defendant was discharged. The record does not state whether, before his discharge, he was under recognizance, or was held in custody, and it is immaterial whether he was committed to jail, or to the custody of his sureties; he was all the time held under the original warrant, or the warrant of commitment, until his discharge on August 7. *Commonwealth* v. *Morihan*, 4 Allen, 585. And that discharge, whether he had been committed or

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held under recognizance, extinguished the authority to hold him under any then existing process. This must necessarily have been the effect, unless his going at large was an escape on account of which he could have been retaken. But a going at large under order of court cannot be an escape, even though the order be irregular and unauthorized. The order amounted to a discharge of the defendant without a judgment, and to nothing more. The record is in the words: "The cause was continued *nisi* upon payment of costs by the defendant, to be again called up for sentence upon notice to the defendant." This was not in terms a final judgment, nor an absolute final disposition of the case; but the question is whether the defendant remained a party to it, and, if not, whether he could subsequently be made a party. The case was not "continued" within any meaning of that word known to the law. A continuance is an adjournment to a time certain; a continuance *nisi* is to a time certain unless something shall occur to cause action upon the case before that time. The record is, that the case is continued until it shall be called up on notice. This purports to be an indefinite adjournment of the court, and a contingent final disposition of the case. The Pub. Sts. *c.* 155, § 71, provide that trial justices may adjourn their courts in all cases, civil or criminal, on trial before them, to any time or place as occasion may require, except as provided in *c.* 212, § 26, which relates to continuances in criminal cases. This requires an adjournment to a time certain.

At common law, justices of the peace could detain in custody, for a reasonable time, prisoners brought before them for trial or examination. If they exceeded that, the custody was illegal, and they were liable in trespass. *Davis* v. *Capper*, 10 B. & C. 28. *Cave* v. *Mountain*, 1 Man. & Gr. 257. D. Davis's Justice, (2d ed.) 56–58. It may be that, prior to the St. of 1821, *c.* 98, there was authority in justices to admit prisoners before them to bail, pending an examination or trial, (see *Potter* v. *Kingsbury*, 4 Day, 98,) though the contrary seems to be laid down in D. Davis's Justice, *ubi supra*. That statute provided that justices of the peace might take the recognizance, with sureties, of any person brought before them for any crime, misdemeanor, or other offence, for his appearance for further examination at a future time, not exceeding ten days.

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The St. of 1783, *c.* 42, was "an act describing the power of justices of the peace in civil actions," and provided in § 2 that "every justice of the peace shall have power by public proclamation to adjourn the trial of any action brought before him, from time to time, when equity may require it." The Rev. Sts. *c.* 85, § 32, authorized a continuance by a justice of the peace of all cases, civil or criminal, on trial before him, to any other time or place, as occasion might require; and *c.* 135, § 9, the chapter relating to the arrest and examination of offenders, reënacted, with changes, the St. of 1821, *c.* 98. It authorized a magistrate to adjourn an examination or trial pending before him, from time to time, not exceeding ten days at one time, without the consent of the defendant or person charged. The words "without the consent of the defendant or person charged" were not in the St. of 1821, nor in the draft of the Revised Statutes reported by the Commissioners. These provisions of the Revised Statutes were reënacted in the Gen. Sts. *c.* 120, § 52, and *c.* 170, § 17; and in the Pub. Sts. *c.* 155, § 71, and *c.* 212, § 26, except that the Pub. Sts. *c.* 155, § 71, first expressed the exception from it of the provisions of *c.* 212, § 26.

It is clear that the trial justice had no power to continue the case indefinitely, and to hold the defendant to appear at a time to be afterwards named. A commitment or recognizance under such an order would be simply void, and a discharge of a defendant under it would be absolute. The record does not expressly state that the defendant was discharged; but that appears, as do other essential things in the record, by implication, because it shows that he could not lawfully be longer held in custody. The record also shows that there was no final judgment, and no termination of the case, unless the discharge of the defendant of itself terminated the case. During the progress of the trial, the case was indefinitely postponed, and the defendant discharged. Pronouncing sentence is a judicial act, and part of the trial. The indefinite postponement would relieve the defendant from lawful custody, and from any obligation to appear and answer further, and from any liability to be arrested and held to answer further. If the order of the magistrate discharged him, without leaving him under any obligation to appear, the magistrate would have no authority to issue a capias to compel

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his appearance: it would work a discontinuance of the case as to him.

In *Doggett* v. *Cook*, 11 Cush. 262, there was a final judgment and sentence, which the defendant continued under obligation to perform. He appealed from the sentence of fine and costs, and the appeal was dismissed in the appellate court as improperly taken, and the case remanded for enforcement of the sentence. The question was as to the mode of enforcing the sentence. The magistrate was held liable for causing the commitment of the defendant, a year after his sentence, on the common mittimus, without first having him brought up on a capias or other process, and giving him an opportunity to pay the fine and costs.

But there is another fact disclosed in this record, which also appeared in *Doggett* v. *Cook*, *ubi supra*. The indefinite postponement was with the consent of the defendant. The payment of costs is not material otherwise than as showing this. The magistrate had no authority to impose it, except as part of a final sentence; and the defendant was under no obligation to pay it. The payment was, by the magistrate, made the consideration of the postponement, and was paid by the defendant to secure the postponement. The postponement was not, and was not intended to be, a continuance, but an end of the prosecution, unless the magistrate should see cause at some future time to notify the defendant that sentence was to be pronounced. It was obviously an arrangement between the trial justice and the defendant, like that sometimes made in the higher courts between the prosecuting officer and a defendant, with the approval of the court, by which, on payment of costs by the defendant, an indictment or complaint is "placed on file." See *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133. The court say, "Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein." 115 Mass. 136.

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When a case is pending in a permanent court of general jurisdiction, with stated terms, in which continuances are from term to term, a defendant may waive the formal entries of continuance, and consent that the case may remain in court without such entries until asked for by either party. The court then retains its jurisdiction of the case and of the defendant, and has authority at any time to make the entries of continuance from term to term, and bring the case forward upon the docket of the term. A trial justice is not a permanent court, with stated terms. His court is a court of record, but it is a temporary court for each case, kept alive by continuances, and exercising limited jurisdiction by prescribed methods. The indefinite postponement of a case before it, is in effect the indefinite postponement of the court. He has no jurisdiction to suspend and revive at his will a case and court before him, and the question whether the consent of the defendant can give him such jurisdiction is very different from the question whether a defendant can consent to an indefinite continuance in the Superior Court. The authority to postpone a sentence by a continuance, not exceeding ten days, without the defendant's consent, and for a longer time with it, may perhaps be inferred from the power given to trial justices, and from the particular provisions in the statute as to continuances; but there is nothing in the statute which gives to a trial justice authority to settle a criminal case before him by receiving the costs from the defendant, and discharging him without judgment and without a continuance, on his agreement to present himself for sentence at any future time on notice. Apart from the abuse to which such a power would be liable, the functions and course of proceeding of justices of the peace in regard to offenders prescribed by statute show that it was never intended that they should have the general power of putting a prisoner convicted before them on probation by indefinitely holding the conviction over him, as is done in higher courts by putting an indictment on file. When such power is given by statute, it is carefully guarded. See Pub. Sts. *c.* 212, §§ 74–81; St. 1885, *c.* 859. We are of opinion that the defendant was not amenable to sentence by the trial justice, and the entry must be, *Proceedings quashed.*

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COMMONWEALTH *vs.* SIMON SAVERY.

Worcester. October 3. — 21, 1887. C. ALLEN & KNOWLTON, JJ., absent.

It is no defence to a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, that the liquors were upon the defendant's premises by mistake, and he did not know that they were intoxicating, if he intended to sell them, and they were in fact intoxicating.

On a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, there was evidence for the government that the defendant had in his possession lager beer containing more than three per cent of alcohol, by volume, at sixty degrees Fahrenheit. The defendant testified that he ordered three per cent beer; that the lager beer was left by mistake; that he did not know that he had any lager beer; and that, if he had found, when he opened the beer, that it was lager beer, he should not have sold it. He asked the judge to instruct the jury, that, if they found that the lager beer was there by mistake, that he did not know it was lager beer, and that he did not intend to sell the same when the opportunity presented itself to him to know its true character and when he did know the true nature of it, and that he would have found out its true nature when he attempted to sell it, he could not be convicted. *Held*, in the absence of evidence that lager beer could be distinguished from three per cent beer in any manner except by analysis, and in the absence of evidence that the defendant intended to make an analysis, the request for instruction was rightly refused.

COMPLAINT for keeping intoxicating liquors with intent unlawfully to sell the same in this Commonwealth. Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

The government introduced witnesses, who testified that they found upon the defendant's premises, in different cases, beer in bottles known as lager-beer bottles; that four bottles of this beer were taken by the officers, one from each case. It was agreed that in one of these bottles so taken the beer contained more than three per cent of alcohol, by volume, at sixty degrees Fahrenheit. The contents of the other bottles were not analyzed.

The defendant offered to show that, when he purchased this beer, he ordered what is known as three per cent beer, and did not order lager beer; that he did not know that any lager beer was upon his premises; that the case containing the lager beer or beer that contained more than three per cent of alcohol was brought there by the person of whom he ordered the three per

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cent beer, and was left by mistake; that he purchased this beer in good faith for three per cent beer; and that if he had found, when he opened the beer, that it was lager beer, he should not have sold it.

The defendant asked the judge to instruct the jury as follows: "1. If you find that the defendant ordered in good faith a beer which the law permits him to sell, known as three per cent beer, and that he did not order lager beer, and that the case of lager was left there at his place by mistake on the part of the person delivering it, and through no fault of his, and that the defendant honestly believed that he had nothing except three per cent beer upon his premises for sale, and did not intend to sell anything which he had not a right to sell under the law, then he should not be found guilty. 2. If the jury shall find that the defendant believed that he had not any lager beer in his possession to sell, but did believe and had good reason to believe that the beer which he had to sell was not lager beer, but a beer known in the market as three per cent beer, which he had a right to sell under the law, and that he did not intend to sell any lager beer, and did not know that he had any lager beer in his possession to sell, then he cannot be convicted under this complaint. 3. Before you can convict the defendant under this complaint, you must be satisfied, upon the evidence, that the defendant knew, or had good reason to know, that the beer which he had in his possession to sell was a beer which he was prohibited by law to sell. 4. If the jury shall find that the lager beer found with the defendant was there by mistake, and that the defendant did not know it was lager beer, and did not intend to sell the same when the opportunity presented itself to him to know the true character of the beer and when he did know the true nature of it, and you find that he would have found out whether it was lager or not when he attempted to sell it, then he cannot be convicted under this complaint."

The judge declined to give any of said instructions in the form in which they were requested, and ruled that, in order to convict the defendant, it must be proved that, at the time referred to, he kept for sale intoxicating liquor, that is, that he kept in his place of business liquor which was in fact intoxicating, intending to sell it as he had opportunity; and that, if that

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was proved, it would be no defence for the defendant to show that he was mistaken as to the kind or quality of liquor, or that he ordered or bought it for liquor which was not intoxicating, and believed that it was not intoxicating, or that the person who delivered it was mistaken about its quality.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. R. Thayer, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

FIELD, J. At the argument in this court, the counsel for the defendant conceded that, if the defendant kept the beer with the intention of selling it, it was not a defence to show that he believed that the beer contained not more than three per cent of alcohol. The keeping of intoxicating liquor for sale without a license is prohibited from considerations of public policy, and the defendant was bound to know the kind and quality of the articles he kept for sale. *Commonwealth* v. *Boynton*, 2 Allen, 160. *Commonwealth* v. *Goodman*, 97 Mass. 117. *Commonwealth* v. *Raymond*, 97 Mass. 567. *Commonwealth* v. *Hallett*, 103 Mass. 452. The ruling of the court was in accordance with this view of the law, and the first three instructions asked for by the defendant ought not to have been given.

There is more difficulty in considering the fourth request. The counsel for the defendant contends, that if the defendant kept the beer, not with the absolute intention of selling it, but with the intention of first testing or analyzing it in order to ascertain the amount of alcohol it contained, and then of offering it for sale only if it was found to contain not more than three per cent of alcohol, he could not be convicted. It is unnecessary to determine the correctness of this contention. The fourth request is not predicated upon the assumption that the defendant actually had the intention of testing or analyzing the beer before offering it for sale, but upon the assumption that he would have found out that the beer was lager beer before he attempted to sell it, and that, if he had found this out, he would not have sold it.

It is implied in the exceptions that what is called three per cent beer is different from lager beer, but it is not found or implied that they differ except in the amount of alcohol they

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respectively contain. It does not appear that they are distinguishable in appearance by persons having no special knowledge of beer, or that one is anything more than a weaker solution of the other.

It may be that if a person, for example, keeps soda water in bottles for sale, and if by mistake a case of lager beer instead of soda water has been left at his place of business by the person of whom he has ordered soda water, he could not be convicted of keeping lager beer for sale, if he never intended to sell lager beer, and if the mistake would have been detected before the lager beer was offered for sale, and the beer would not have been sold by him. Soda water and lager beer are articles of different kinds, easily distinguishable at sight, and a person may well intend to deal in one and not in the other. If, however, a person keeps beer containing alcohol for sale without a license, intending that the beer shall not contain more than three per cent of alcohol, and by mistake he buys beer for sale which contains more than this amount of alcohol, he may be said to keep this beer with the intention of selling it, unless his intention is that the quantity of alcohol in the beer shall be ascertained by examination or analysis before it is offered or exposed for sale. This is merely a mistake in the quality of the article he intends to sell, which may or may not be discovered before he sells it.

The defendant testified "that he purchased this beer in good faith for three per cent beer; and that if he had found, when he opened the beer, that it was lager beer, he should not have sold it;" and that the beer found on his premises was left there by mistake. The nature of the mistake does not appear, unless it was the mistaken belief on the part of the buyer, and perhaps of the seller, that the beer did not contain more than three per cent of alcohol. Upon this evidence, the jury were not required to speculate upon the probability of the defendant's finding out that the beer contained more than three per cent of alcohol before he sold it, in the absence of evidence that he actually intended to test the beer before he offered it for sale.

Exceptions overruled.

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COMMONWEALTH *vs.* MAURICE WALL.

Worcester. October 3. — 21, 1887. C. ALLEN & KNOWLTON, JJ., absent.

At the trial of a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, the defendant admitted that a license issued to him to sell such liquors had been revoked by the board of aldermen granting it, upon proof satisfactory to the board that he had violated the conditions thereof. The defendant, for the purpose of showing that said revocation was invalid, on the ground that he was afforded no reasonable opportunity to be heard, offered to show that he was cited to appear before the board on a certain evening, to attend a hearing upon the revocation of his license; that on that evening he was confined to his bed by reason of illness, and was unable to attend the hearing; that he was represented by counsel, who presented to the board the certificate of his physician of his physical inability to be present, and requested a continuance of the hearing; that thereupon the city marshal stated to the board, but not under oath, that the defendant was in his saloon attending to business that afternoon, which statement the defendant offered at the trial to prove was incorrect; that it was then voted to proceed with the hearing; that the board refused his request for a continuance, upon which his counsel left; and that, after a hearing, the board revoked the license. The judge ruled that, upon these facts, if proved, the revocation was valid. *Held*, that the ruling was right.

COMPLAINT for keeping, on July 9, 1887, intoxicating liquors with intent unlawfully to sell the same in this Commonwealth. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, in substance as follows:

The evidence for the government tended to show that the defendant, on July 9, 1887, kept certain intoxicating liquors at his grocery, with intent to sell the same.

It was admitted by the government that the defendant had received from the board of aldermen of Worcester a license of the fourth class, for the sale of intoxicating liquors at his grocery for the term of one year from the first day of May, 1887.

It was admitted by the defendant, that the board of aldermen, on June 6, 1887, passed an order revoking his said license, upon proof satisfactory to the board that he had violated the conditions thereof.

The defendant, for the purpose of showing said order of revocation to be invalid, and not destructive of his rights under said license, on the ground that no reasonable opportunity was

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afforded the defendant to be heard, offered to show that, on Saturday, June 4, 1887, he was cited to appear before said board of aldermen on the following Monday evening, June 6, at eight o'clock, to attend a hearing upon the revocation of his license; that on said Monday evening he was confined to his bed by reason of sickness, and was unable to attend said hearing; that he was represented by counsel, who presented to the board of aldermen the certificate of his physician of his physical inability to be present, and requested a continuance of said hearing; that thereupon the city marshal stated to the board, but not under oath, that the defendant was in his saloon attending to business that afternoon, which statement the defendant now offered to prove was incorrect; that it was then voted to proceed with the hearing; that the aldermen refused his request for a continuance, upon which his counsel left; and that the board, after a hearing, revoked his license.

The judge ruled that, upon the foregoing facts, if proved, the revocation was valid. The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. R. Thayer, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

FIELD, J. It is admitted by the defendant, that the record of the board of aldermen showed that his license had been by it declared to be forfeited, upon proof satisfactory to the board that he had violated the conditions of the license; and that this was done after notice to him, and an opportunity to be heard. Pub. Sts. c. 100, § 16. See *Commonwealth* v. *Moylan*, 119 Mass. 109; *Commonwealth* v. *Hamer*, 128 Mass. 76.

He contends, however, that the facts which he offered to prove show that he did not have a reasonable opportunity to be heard. His alleged grievance is, that, on account of his illness, he was entitled to a continuance of the hearing, and that this was refused.

The defendant was represented by counsel, who left after the request for a continuance had been refused. It thus appears that the board of aldermen had jurisdiction over the subject matter, and over the person of the defendant, so far as was required, in order to enable it to determine the question before the board. The motion for a continuance was addressed to the

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discretion of the board. We need not decide whether the manner in which this discretion was exercised can be reviewed by this court, for, if this can be done, it can only be by some proceeding to which the board of aldermen is a party.

Exceptions overruled.

A. J. EATON *vs.* ALBERT TUSON.

Worcester. October 4. — 21, 1887. C. ALLEN & HOLMES, JJ., absent.

On October 12, A. made to B. a mortgage of "all the personal property described in a mortgage given by me to C.," reciting that "said mortgage has never been discharged, and said C. still holds the same," and covenanting that said property was free from all incumbrances, "except so far as the aforesaid mortgage may be an incumbrance thereon." On October 13, A. made to B. another mortgage of "the same property described in a mortgage from grantor to grantee," dated October 12, "and said property is subject to the incumbrances mentioned in said prior mortgage to grantee." On October 17, A. made to B. a third mortgage of "all the personal property previously mortgaged to grantee by mortgage dated October 13, to which reference is had for a description," and covenanting that the property was free from all incumbrances, "except a mortgage to C. upon which there is nothing owing or due, and two prior mortgages to grantee." *Held*, that the mortgage of October 17 only conveyed to B. the mortgagor's right of redemption from the mortgage to C., and was subject to the mortgage to C., although the latter mortgage had not been recorded.

TORT, for the conversion of a lot of furniture. Answer, a general denial. Trial in the Superior Court, before *Staples*, J., who allowed a bill of exceptions, in substance as follows:

On December 13, 1880, one William T. Carroll mortgaged to the defendant the furniture in question, specifically describing it, to secure the payment of a promissory note for $47 and interest, in three days from date. This mortgage was never recorded.

On October 12, 1883, said Carroll made a mortgage to the plaintiff, to secure the payment of $50 in six months, containing the following description: "All the personal property described in a mortgage given by me to Albert Tuson to secure the payment of a note given by me to said Tuson, December 13, 1880, for forty-seven dollars, payable in fifty-five days after date; and

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said Tuson still holds said note, and said mortgage has never been discharged, and said Tuson still holds the same." The mortgagor covenanted that said goods and chattels were free from all incumbrances, "except so far as the aforesaid mortgage may be an incumbrance thereon," and warranted "against all persons except as aforesaid." This mortgage was duly recorded on the same day.

On October 13, 1883, Carroll made another mortgage to the plaintiff to secure the payment of $50 in one year, with this description: "The same property described in a mortgage from grantor to grantee, recorded with Worcester city registry of mortgages of personal property, October 12, 1883, and said property is subject to the incumbrances mentioned in said prior mortgage to grantee." The mortgagor covenanted that said goods and chattels were "free from all incumbrances except as aforesaid;" and warranted "against all persons except as aforesaid." This mortgage was recorded upon the day of its date.

On October 17, 1883, Carroll made another mortgage to the plaintiff, containing this description: "All the personal property previously mortgaged to grantee by mortgage dated October 13, 1883, and recorded with Worcester city mortgages of personal property, to which reference is had for a description." The covenant in this mortgage is as follows: "And I hereby covenant with the grantee that I am the lawful owner of the said goods and chattels; that they are free from all incumbrances, except a mortgage to Albert Tuson, upon which there is nothing owing or due, and two prior mortgages to grantee; that I have good right to sell and convey the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons." The condition in this mortgage is as follows: "Provided nevertheless that if I, or my executors, administrators, or assigns, shall pay unto the grantee, or his executors, administrators, or assigns, the sum of twenty-five dollars, on demand from this date, with interest semiannually at the rate of six per cent per annum, and shall also pay all former notes and mortgages, as also one note of even date herewith, signed by me, whereby I promise to pay to the grantee or order the said sum and interest at the times aforesaid, shall both be void." This mortgage was recorded on October 18, 1883.

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The plaintiff, on October 18, 1883, gave to Carroll a notice of his intention to foreclose the last recited mortgage. The notice and affidavit of the service were recorded on October 19, 1883.

The plaintiff, in October, 1883, went to the dwelling-house of Carroll, took possession of said property, and appointed Frances C. Carroll, wife of William T. Carroll, his agent to care for said property.

On December 11, 1883, the defendant procured a replevin writ, in which writ the defendant was named as plaintiff and Frances C. Carroll was named as defendant, and caused the same to be served, and the property described in the mortgages aforesaid to be taken thereon.

There was no evidence of the conversion of said property by the defendant, except that the officer replevied it on said replevin writ; and it was in evidence that no demand was ever made upon the defendant by the plaintiff for said property before the bringing of this action.

It also appeared in evidence, that the defendant recovered judgment in the Central District Court of Worcester on August 23, 1884, in an action upon said note for the sum of $51.23. It appeared that a greater part of said sum was due when said replevin writ was sued out by the defendant; and that the defendant procured said writ for the purpose of enforcing his right against said property under his mortgage, and for the purpose of foreclosing said mortgage and applying the proceeds of said sale toward the payment of the debt thereby secured.

The defendant contended, and asked the judge to rule, that a demand upon him for said property before bringing this action was necessary; that this action could not be maintained; and that the title, if any, which the plaintiff took under his several mortgages, was subject to the prior mortgage of the defendant, which was then in force between the parties.

The judge ruled that the plaintiff's title was subject to the unrecorded mortgage of the defendant, and that, upon the whole evidence, the action could not be maintained; and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. H. Bancroft, for the plaintiff.

F. W. Blackmer & E. H. Vaughan, for the defendant.

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FIELD, J. The question in this case is whether the plaintiff's title was subject to the unrecorded mortgage of the defendant. The first two mortgages given to the plaintiff, we think, clearly purport to convey to the plaintiff the property, subject to the mortgage to the defendant; or, in other words, only to convey the mortgagor's right of redeeming the property from the mortgage to the defendant. The third mortgage to the plaintiff is of "all the personal property mortgaged to grantee by mortgage dated October 13, 1883, and recorded with Worcester city mortgages of personal property, to which reference is had for a description." The mortgage dated October 13, 1883, is made expressly subject to the incumbrances mentioned in the prior mortgage of October 12, 1883, and the mortgage to the defendant is an incumbrance expressly mentioned in this mortgage of October 12, 1883. The mortgage of October 17, 1883, therefore, only conveyed to the plaintiff the mortgagor's right of redemption from the mortgage to the defendant. The case is governed by *Tuite* v. *Stevens*, 98 Mass. 305, *Howard* v. *Chase*, 104 Mass. 249, and *Pecker* v. *Silsby*, 123 Mass. 108.

Exceptions overruled.

WILLIAM E. LANE *vs.* CALVIN HOLMAN.

Worcester. October 5. — 21, 1887. C. ALLEN & KNOWLTON, JJ., absent.

Under the Pub. Sts. *c.* 162, § 18, requiring that the notice issued to a debtor, to appear and submit himself to examination touching his estate, be served by delivering a copy to him or leaving it at his last and usual place of abode, "allowing not less than three days before the time fixed for the examination, and at the rate of one day additional for every twenty-four miles' travel," if the debtor lives fifteen miles distant from the place fixed for the examination, the service of the notice upon him there must be made at least fifteen hours before the beginning of the third day from the day fixed for the examination.

If the service of notice to a debtor to appear and submit himself to examination touching his estate does not give him the full time allowed by the Pub. Sts. *c.* 162, § 18, and he does not appear in obedience to the notice, and is defaulted, the magistrate has no authority to annex his certificate to the execution authorizing the arrest of the debtor; and, as against the creditor causing the arrest, his arrest thereon is illegal.

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A debtor, who has been illegally arrested, does not, by recognizing before a magistrate other than the one authorizing the arrest, and submitting to examination and taking the oath for the relief of poor debtors, waive the illegality of the arrest.

The expenses incurred by a debtor, who has been illegally arrested, in submitting himself to examination for the purpose of taking the oath for the relief of poor debtors and taking the oath, having previously been discharged from imprisonment upon entering into a recognizance to appear for such examination, are not elements of damage in a subsequent action for the illegal arrest.

TORT for an illegal arrest and false imprisonment. At the trial in the Superior Court, before *Staples*, J., the jury returned a verdict for the plaintiff; and the judge reported the case for the determination of this court. The facts appear in the opinion.

J. W. Corcoran & H. Parker, for the defendant.

G. H. Mellen, for the plaintiff.

FIELD, J. It is contended that the arrest was unlawful, because, although the certificate of arrest was issued after notice to the debtor to appear and submit himself to an examination touching his estate, pursuant to the Pub. Sts. *c.* 162, § 18, the service of the notice was insufficient.

The statute requires that the notice be served "by delivering an attested copy of the notice to the debtor, or leaving the same at his last and usual place of abode, allowing not less than three days before the time fixed for the examination, and at the rate of one day additional for every twenty-four miles' travel." The plaintiff resided at Worcester, and the notice was served upon him there on November 17, 1885, at ten o'clock in the forenoon. The time fixed for the examination was November 20, 1885, at nine o'clock in the forenoon, and the place was the court-room in Clinton, which was fifteen miles distant from the plaintiff's residence in Worcester, and the same distance from the place where he was served with the notice.

In construing statutes which provide for the service of process, or of notice, when the process is required to be served, or the notice to be given, a certain number of days before the return day, the days have been reckoned by excluding the return day, and including the day on which the process is served or the notice given, and fractions of a day have not been regarded, because the statutes have made a day the unit of time. *Butler* v. *Fessenden*, 12 Cush. 78. *Bemis* v. *Leonard*, 118 Mass. 502, 507.

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Stewart v. *Griswold*, 134 Mass. 391. If, then, the statute had not required that additional time be given for travel, the service in this case would have been sufficient; but as the statute requires that time be allowed for travel, in addition to the three days, and as fractions of these three days are not regarded, it follows that the earliest time on which a notice can be served, if time is allowed for travel, is on the fourth day before the day fixed for the examination. In estimating the time to be allowed for travel, it is plainly the intention of the statute that a day may be divided. Time is to be allowed "at the rate of one day additional for every twenty-four miles' travel," that is, at the rate of one hour for each mile of travel. The plaintiff was therefore entitled to an allowance of fifteen hours for travel in addition to the three days' notice, and therefore the service, to be sufficient, should have been made at least fifteen hours before the beginning of the third day from the day fixed for the examination. *Stewart* v. *Griswold*, *ubi supra*.

The plaintiff did not appear in obedience to this notice, and was defaulted, and the magistrate thereupon annexed to the execution a certificate of arrest. There was no waiver by the plaintiff of the defect in the service, and the act of the magistrate in making and annexing this certificate to the execution was not authorized by law, and the arrest was illegal. While the process, if valid upon its face, may protect the officer, it does not protect the creditor at whose request the unlawful act is done; and the debtor, by recognizing before another magistrate, and by submitting himself to an examination for the purpose of taking the oath for the relief of poor debtors, and by taking the oath, does not waive the illegality of the arrest. *Carleton* v. *Akron Sewer Pipe Co.* 129 Mass. 40.

After the plaintiff had obtained his discharge by entering into a recognizance before a master in chancery, the imprisonment was at an end. He could have been discharged from imprisonment by other methods, if he had chosen to employ them. After his discharge on giving his recognizance, he was under no legal obligation to appear before the magistrate and submit himself to an examination. He could have successfully defended a suit on the recognizance. See *Stewart* v. *Griswold*, *ubi supra*. The expenses incurred after he was discharged were voluntarily

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incurred, and were rightly excluded as elements of damage resulting from the arrest and imprisonment.

By the terms of the report, judgment is to be entered on the verdict. *So ordered.*

WILLIAM MURPHY *vs.* JAMES MURPHY.

Worcester. October 6. — 21, 1887. C. ALLEN & KNOWLTON, JJ., absent.

Under the Pub. Sts. c. 18, § 1, and c. 181, § 2, the certificate of an entry made for the breach of a condition of a mortgage may be sworn to before a notary public.

WRIT OF ENTRY to recover a certain tract of land in Holden. Plea, *nul disseisin*. Trial in the Superior Court, before *Staples*, J., who allowed a bill of exceptions, in substance as follows:

It appeared that the demanded premises were conveyed to the demandant by a mortgage deed dated April 18, 1866, and recorded within a few days after its date.

The demandant put his mortgage in evidence; and the breach of a condition thereof at the time of the entry hereinafter referred to was admitted. It appeared that the demandant, June 27, 1882, made an open and peaceable entry on the premises for breach of a condition of said mortgage, not being opposed by the mortgagor, the tenant, or other person in the same; and that such possession had continued peaceably for three years before the beginning of this action. The demandant put in evidence a certificate of two competent witnesses to prove said entry, made and sworn to before a notary public for the county of Worcester; and it appeared that the certificate was, within thirty days after the entry, duly recorded under the Pub. Sts. *c.* 181, § 2.

The tenant asked the judge to rule, that said certificate was insufficient in law, in that the same was not sworn to before a justice of the peace. The judge refused so to rule, and ruled that the certificate was sufficient.

The jury returned a verdict for the demandant, and the tenant alleged exceptions.

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L. F. O'Connell, for the tenant.

F. P. Goulding, for the demandant.

FIELD, J. The single exception of the tenant is, that the certificate of the entry made for the breach of a condition of the mortgage was not sworn to before a justice of the peace, but was sworn to before a notary public. Pub. Sts. c. 181, § 2. Gen. Sts. c. 140, § 2. Rev. Sts. c. 107, § 2. Sts. 1785, c. 22, § 2; 1793, c. 77, § 1.

The provision requiring a certificate of the entry to be made and recorded, and, if not made by the mortgagor or the person claiming under him, to be made by two competent witnesses and sworn to before a justice of the peace, was first enacted in the Revised Statutes. See Amendments to the Report of the Commissioners on the Revised Statutes adopted by the Committee, 134.

In the [illegible] Sts. c. 85, § 36, it was enacted that "every justice of [illegible]e may administer oaths, in all cases in which an oath is [illegible] be required, unless a different provision shall be expre[illegible]e by law." Of this section the Commissioners on t[illegible]d Statutes [illegible] "This section will probably add [illegible] nothing [illegible]uthority of justices of the peace; [illegible]y save [illegible] future legislation, by preventing [illegible] in the [illegible] acts in which an oath is require[illegible]ken." [illegible]on the Rev. Sts. c. 85, § 35, note. [illegible] Sts. c. [illegible] St. 1870, c. 120; Pub. Sts. c. 155.

By [illegible]ts. c. [illegible] notaries public shall have the same [illegible] to ad[illegible]hs as justices of the peace." Gen [illegible] § 34 [illegible]s first enacted by the St. of 185[illegible]

[illegible] it was customary in enacting [illegible]ired, to designate in the statute [illegible]gistrates, before whom the oath [illegible] was sometimes left to be deter[illegible]r the Revised Statutes, unless a [illegible]essly made by law, [illegible]tice of the [illegible] oath required t[illegible] and the [illegible]ere often sile[illegible] the per[illegible]om it shou[illegible]

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incurred, and were rightly excluded as elements of damage resulting from the arrest and imprisonment.

By the terms of the report, judgment is to be entered on the verdict. *So ordered.*

WILLIAM MURPHY *vs.* JAMES MURPHY.

Worcester. October 6. — 21, 1887. C. ALLEN & KNOWLTON, JJ., absent.

Under the Pub. Sts. *c.* 18, § 1, and *c.* 181, § 2, the certificate of an entry made for the breach of a condition of a mortgage may be sworn to before a notary public.

WRIT OF ENTRY to recover a certain tract of land in Holden. Plea, *nul disseisin*. Trial in the Superior Court, before *Staples*, J., who allowed a bill of exceptions, in substance as follows:

It appeared that the demanded premises were conveyed to the demandant by a mortgage deed dated April 18, 1866, and recorded within a few days after its date.

The demandant put his mortgage in evidence; and the breach of a condition thereof at the time of the entry hereinafter referred to was admitted. It appeared that the demandant, on June 27, 1882, made an open and peaceable entry on the premises for breach of a condition of said mortgage, not being opposed by the mortgagor, the tenant, or other person claiming the same; and that such possession had continued peaceably for three years before the beginning of this action. The demandant put in evidence a certificate of two competent witnesses to prove said entry, made and sworn to before a notary public for the county of Worcester; and it appeared that said certificate was, within thirty days after the entry, duly recorded, under the Pub. Sts. *c.* 181, § 2.

The tenant asked the judge to rule, that said certificate was insufficient in law, in that the same was not sworn to before a justice of the peace. The judge refused so to rule, and ruled that the certificate was sufficient.

The jury returned a verdict for the demandant; and the tenant alleged exceptions.

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L. F. O'Connell, for the tenant.

F. P. Goulding, for the demandant.

FIELD, J. The single exception of the tenant is, that the certificate of the entry made for the breach of a condition of the mortgage was not sworn to before a justice of the peace, but was sworn to before a notary public. Pub. Sts. *c.* 181, § 2. Gen. Sts. *c.* 140, § 2. Rev. Sts. *c.* 107, § 2. Sts. 1785, *c.* 22, § 2; 1798, *c.* 77, § 1.

The provision requiring a certificate of the entry to be made and recorded, and, if not made by the mortgagor or the person claiming under him, to be made by two competent witnesses and sworn to before a justice of the peace, was first enacted in the Revised Statutes. See Amendments to the Report of the Commissioners on the Revised Statutes adopted by the Committee, 134.

In the Rev. Sts. *c.* 85, § 36, it was enacted that "every justice of the peace may administer oaths, in all cases in which an oath is or shall be required, unless a different provision shall be expressly made by law." Of this section the Commissioners on the Revised Statutes say: "This section will probably add little or nothing to the authority of justices of the peace; but it may save trouble in future legislation, by preventing repetition in the numerous acts in which an oath is required to be taken." Com. Rep. on the Rev. Sts. *c.* 85, § 35, note. See Gen. Sts. *c.* 120, § 49; St. 1870, *c.* 120; Pub. Sts. *c.* 155, § 2.

By the Pub. Sts. *c.* 18, § 1, "Notaries public shall have the same authority to administer oaths as justices of the peace." Gen. Sts. *c.* 14, § 34. This was first enacted by the St. of 1851, *c.* 29.

Before the Revised Statutes, it was customary in enacting statutes, when an oath was required, to designate in the statute the person, magistrate or magistrates, before whom the oath must be taken, although this was sometimes left to be determined by the context. After the Revised Statutes, unless a different provision was expressly made by law, a justice of the peace might administer any oath required to be taken, and the statutes requiring an oath were often silent in regard to the person or magistrate before whom it should be taken.

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In administering an oath to the witnesses who have made a certificate of entry upon land for breach of the condition of a mortgage, there is nothing in the nature of a judicial proceeding. A justice of the peace was the person designated to administer the oath, because he was the magistrate usually designated to administer oaths in proceedings not judicial, and of which no record other than the jurat of the magistrate was required. The purpose of the statute was to require the certificate to be verified by an oath in such a manner that the witnesses could be convicted of perjury if it were false. The phraseology of the Revised Statutes has been retained in the General Statutes and in the Public Statutes, because no substantial change of the law was intended, and probably without any reference to the authority given to notaries public to administer oaths. As it is now the intention of the statutes that notaries public shall have the same authority to administer oaths as justices of the peace have, we are of opinion that a notary public had authority to administer the oath in this case; and that, taking all the statutory provisions together, the Pub. Sts. *c.* 181, § 2, must be construed to mean that the certificate must be sworn to before a person having the authority of a justice of the peace to administer an oath. *Exceptions overruled.*

ADELAIDE COBURN *vs.* TRAVELERS' INSURANCE COMPANY.

Hampden. Sept. 28. — Oct. 24, 1887. C. ALLEN & HOLMES, JJ., absent.

In an action upon a policy of insurance against bodily injuries "effected through external, violent, and accidental means," and against loss of life resulting from such injuries within ninety days, and containing a condition that immediate written notice shall be given to the company of any accident and injury for which claim is made, and that, unless affirmative proof of death or duration of disability is so furnished within seven months from the time of such accident, all claims based thereon shall be forfeited, the declaration set forth a contract made by the policy; and alleged the death of the assured from bodily injury "effected through external, violent, and accidental means," which injury occasioned his death within ninety days thereafter, and that due proof of such death and injuries was given to the company. The answer contained a general

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denial, and alleged that, if the death of the assured should be proved to have occurred within the term of the policy, "he did not die in consequence of external, violent, and accidental means." *Held*, that the defence that the immediate written notice of the injuries required by the policy had not been given was not open under the answer.

In an action upon a policy of insurance against bodily injuries "effected through external, violent, and accidental means," and against loss of life resulting from such injuries within ninety days, and containing a condition reciting that "this insurance does not cover disappearances," and enumerating a large number of injuries and death from a variety of causes as not covered by it, including "intentional injuries inflicted by the insured or any other person," the declaration set forth a contract made by the policy; and alleged the death of the assured from bodily injury "effected through external, violent, and accidental means," which injury occasioned his death within ninety days thereafter. The answer denied every material allegation of the declaration; and alleged that, if the death of the assured should be proved to have occurred within the term of the policy, "he did not die in consequence of external, violent, and accidental means." *Held*, that the defence that the injuries sustained by the assured were intentional was not open under the answer.

DEVENS, J. The policy upon which the plaintiff seeks to recover is known as an accident policy. It insured F. C. Coburn in the sum of ten dollars a week against loss of time, not exceeding twenty-six weeks, "resulting from bodily injuries effected during the term of this insurance, through external, violent, and accidental means," which should wholly disable him from transacting the business of his occupation; or if death should "result from such injuries within ninety days," the defendant agreed to pay to his wife Adelaide the sum of two thousand dollars. The policy thus written had on the back of it certain "agreements and conditions under which this policy is issued and accepted." The declaration sets forth a contract made by the policy, and alleges the death of F. C. Coburn from "bodily injury effected through external, violent, and accidental means," which injury occasioned his death within ninety days thereafter. It further alleges that due proof of such death and injuries was given to said company. The answer of the defendant denies "each and every material allegation in the plaintiff's declaration," and alleges that, if the death of the assured shall be proved to have occurred within the term of the policy, "he did not die in consequence of external, violent, or accidental means."

The second of the "agreements and conditions" is as follows: "Immediate written notice is to be given said company at Hartford of any accident and injury for which claim is made, with

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full particulars thereof, and full name and address of the insured. Unless affirmative proof of death or duration of disability is so furnished within seven months from the time of such accident, all claims based thereon shall be forfeited to the company." These agreements and conditions concluded with a "notice" that, in case of the death or disabling injury of the assured, notice of the fact, giving full particulars, &c., "should be given immediately to Homer G. Gilmore, Agent, 425 Main St., Springfield, Mass."

That the full proofs were given to the company within seven months after the injury is conceded; but the defendant contends that the immediate written notice required by the clause of the conditions above quoted was not given. The first question presented is whether this defence is open under the answer. Immediate notice was not a fact which the plaintiff was compelled to allege or prove in order to maintain her case; the failure to give it was a matter which, if available as a defence, was so in defeat or avoidance of the plaintiff's claim. When a defendant intends to rest his defence upon a fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out in precise terms in the answer. *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 541. *Orrell* v. *Hampden Ins. Co.* 13 Gray, 431. *Peirce* v. *Cohasset Ins. Co.* 123 Mass. 572.

The presiding judge, by ruling that the question whether the notice required in paragraph 2 of the "agreements and conditions" had been given, or, if not given, whether the same had been waived, was for the determination of the jury, and, by directing a verdict for the defendant, in substance ruled, against the contention of the plaintiff, that this defence was open, and further that there was no evidence offered by the plaintiff sufficient to go to the jury that immediate notice had been given. The effect of this ruling was to place upon the plaintiff the burden of negativing by proof that which was matter in avoidance of the action, and which had not been pleaded by the defendant. This was, we think, erroneous. It would not be profitable now to consider whether there was evidence that the condition as to immediate written notice had been complied with, or that this condition had been waived.

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It is further to be considered whether it was correctly ruled at the trial that the defence that the injury sustained by Coburn was intentional was open under the answer, and, further, that there was no evidence upon which the jury would be warranted in finding that the same was not intentional. The third paragraph of the conditions on the back of the policy commences as follows: "This insurance does not cover disappearances," and it enumerates a large number of injuries, and death from a variety of causes, as not covered by it, including "intentional injuries inflicted by the insured or any other person." The answer, denying that the death of Coburn was occasioned "by external, violent, or accidental means," makes no averment that he died from intentional injuries, and leaves it to fair inference that the defence relied on was that the death of Coburn resulted from natural causes. If the defence of intentional injury is now open, it is because the plaintiff in her declaration should have negatived every cause of death enumerated in the third paragraph, and have been ready to prove the same in order to establish her cause of action.

Stipulations added to a principal contract, which are intended to avoid the defendant's promise by way of defeasance or excuse, must be pleaded in defence, and must be sustained by evidence. They are in the nature of provisos. Exceptions which leave the defendant liable to perform that which remains after the part excepted is taken away are to be negatived, and it is not always easy to determine to which class a stipulation belongs. In the case at bar, the third paragraph states that the insurance does not cover certain causes of death named, but the nature and character of a stipulation is to be considered as well as the form of it; and the use of the phrase "does not cover" is by no means decisive of its character. *Freeman* v. *Travelers' Ins. Co.* 144 Mass. 572. In *Sohier* v. *Norwich Ins. Co* 11 Allen, 336, the clause was inserted, "This policy not to cover any loss or damage by fire which may originate in the theatre proper," and it was held that it was for the plaintiff to show a loss not originating in the theatre proper. But the clause was there written in between the statement of what was insured and the promise to pay in case of loss, in close connection with and qualification of the description of the subject matter of the insurance.

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Certain provisos were also set forth in a different part of the instrument, and the clause was on that account also deemed a direct limitation of the risk against which insurance was effected.

In the case at bar the policy itself is general, and insures against death or injury to Coburn by external, violent, and accidental means. It is made subject to certain agreements and conditions annexed thereto. The occurrence of these conditions is to operate to defeat the policy, and this should be shown by the party relying upon them. If the rule of pleading as stated in *Commonwealth* v. *Hart*, 11 Cush. 130, 134, be applied, it will be seen that intentional injury must be held to be a condition by reason of which the policy is not applicable. When operative, it has the effect of taking out of the general clause that which otherwise is included in it. The fair construction of this policy, with its agreements and conditions, is that the defendant insures Coburn against death or injury from external, violent, and accidental causes, provided that such death or injury does not proceed from those causes enumerated in paragraph 3. *Freeman* v. *Travelers' Ins. Co.*, *ubi supra*. We are therefore of opinion that the defence of intentional injury was not open to the defendant; and that it was erroneous also to place the burden of negativing this as a cause of death upon the plaintiff.

On account of the different posture, upon the evidence, which the case may hereafter assume should the defendant be permitted to amend its answer and again proceed to trial, it would not be desirable now to consider the construction of the phrase "intentional injury" within the meaning of the policy, which was somewhat discussed in the argument. *Verdict set aside.*

J. B. Carroll, for the plaintiff.

E. H. Lathrop, for the defendant.

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COMMONWEALTH *vs.* AMOS INGERSOLL & another.

Essex. November 1. — 2, 1887. DEVENS & KNOWLTON, JJ., absent.

At the trial of a complaint for maintaining a tenement used for the illegal sale of intoxicating liquors in G., a witness for the government testified that he had been hired by a person to go to G., and there buy intoxicating liquors, and obtain evidence for the purpose of making complaints for violation of the Pub. Sts. *c.* 100; that, while in G., he bought intoxicating liquors in the tenement named in the complaint; and that he did this for the purpose of prosecuting the defendant. The defendant asked the judge to rule that "the jury are to look upon the testimony of the witness with the greatest caution and distrust." The judge declined so to rule; and instructed the jury in reference to the witness as follows: "Judge him from his appearance, the plausibility of his story, and his relation to the case. Judge of him as you would any other witness. See if he has any motive to falsify. Look at him in all his relations to the case, and say whether upon the whole you believe his story." *Held*, that the defendant had no ground of exception.

COMPLAINT to the Police Court of Gloucester for keeping and maintaining a common nuisance, to wit, a certain tenement in Gloucester, used for the illegal sale and illegal keeping of intoxicating liquors, on July 1, 1886, and on divers other days and times between that day and December 7, 1886. Trial in the Superior Court, on appeal, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows:

The government called as a witness one Thompson, who testified that he lived in Watertown; that he had been hired by a person in Watertown to go to Gloucester, and there make purchase of intoxicating liquors, and obtain evidence for the purpose of making complaints for violation of the liquor law; that, in pursuance of said purpose, he went to Gloucester, and, while there, he purchased intoxicating liquors in the tenement alleged to have been kept and maintained as aforesaid; that he obtained from another person in the defendants' employ certain intoxicating liquors, by purchase; and that he did this for the purpose of prosecuting the defendants under the Pub. Sts. *c.* 100.

The defendants requested the judge to instruct the jury as follows: "The jury are to look upon the testimony of the witness Thompson with the greatest caution and distrust."

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The judge declined to rule as requested, but instructed the jury in reference to the witness Thompson as follows: "Judge him from his appearance, the plausibility of his story, and his relation to the case. Judge of him as you would any other witness. See if he has any motive to falsify. Look at him in all his relations to the case, and say whether upon the whole you believe his story."

The jury returned a verdict of guilty; and the defendants alleged exceptions.

F. L. Evans, for the defendants.

A. J. Waterman, Attorney General, for the Commonwealth.

By the Court. The court was not required to give the instruction requested by the defendants. The weight to be given to the testimony of the witness for the government was for the jury; and the instructions given were sufficiently favorable to the defendants. *Commonwealth* v. *Trainor*, 123 Mass. 414. *Commonwealth* v. *Mason*, 135 Mass. 555.

Exceptions overruled.

Commonwealth *vs.* William C. Christie.

Essex. November 4. — 5, 1887. Devens & Knowlton, JJ., absent.

At the trial of a complaint for keeping intoxicating liquors, with intent to sell the same unlawfully, the only issue in dispute was whether the defendant was the proprietor of a certain saloon. A police officer testified to an admission of the fact by the defendant at a certain interview when no one else was present. The defendant and two other witnesses testified to a conversation between the defendant and the police officer differing essentially from the version given by the latter. The defendant contended in his argument to the jury that the officer was mistaken. The district attorney contended that, if the jury acquitted the defendant, they would brand the officer as a perjurer. The defendant asked the judge to instruct the jury that it was not necessary for the jury to disbelieve the officer in order to acquit; that, if all the evidence left their minds in doubt as to what was said, the defendant was entitled to the benefit of it. The judge did not instruct the jury as requested, but instructed them that the material allegations of the complaint were to be proved beyond a reasonable doubt, and that they were to consider the intelligence of the officer, and whether he understood and interpreted the conversation correctly; and that they were not responsible for the effect, if any, of their verdict upon witnesses. *Held*, that the defendant had no ground of exception.

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COMPLAINT for keeping intoxicating liquors on September 10, 1887, at Haverhill, with intent to sell the same unlawfully in this Commonwealth. Trial in the Superior Court, on appeal, before *Sherman*, J., who allowed a bill of exceptions, in substance as follows:

The only issue tried was that of proprietorship. As bearing upon this issue, the government introduced the evidence of Austin C. Sprague, a police officer, who testified that on the day alleged in the complaint he saw the defendant at a certain saloon in Haverhill, in the basement thereof; that the witness was about to open a door into an adjoining basement, when the defendant said, "If you find anything in there don't lay it to me; this is all I hire." Sprague further testified that no one was present during the conversation except the defendant.

The defendant introduced, among other testimony, the testimony of two witnesses besides himself, as to his declarations to Sprague, differing essentially from the version given by Sprague.

The defendant's counsel did not contend that Sprague had perjured himself, but urged upon the jury that he must be mistaken in his version and had confounded it with the facts in some other case, and that the testimony introduced in behalf of the defendant ought to create a doubt in their minds as to the correctness of the officer's version.

The district attorney, in arguing the case for the government, submitted to the jury, in substance, that, if they acquitted the defendant, they would, in doing so, be branding Sprague as a perjurer.

The defendant asked the judge to instruct the jury as follows: "It is not necessary for the jury to disbelieve Sprague in order to acquit. If all the evidence leaves their minds in doubt as to what was said, the defendant is entitled to the benefit of it." The judge instructed the jury that all the material allegations of the complaint were to be proven beyond a reasonable doubt, and gave general instructions, not excepted to; and the judge did not instruct the jury as requested, but instructed them that they were to consider the intelligence of the officer, and whether he understood and interpreted the conversation correctly; and that they were not responsible for the effect, if any, of their verdict upon witnesses.

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The jury returned a verdict of guilty; and the defendant alleged exceptions to the refusal to rule as requested.

B. F. Brickett & C. H. Poor, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

By the Court. The court was not required by law to give the instruction requested by the defendant. The instructions given, that the government must prove all its material allegations beyond reasonable doubt, and that the jury were to consider the intelligence, memory, and accuracy of the witness Sprague, were sufficient and appropriate.

Exceptions overruled.

Alexander McCallum *vs.* Jasper E. Lambie.
Chauncey H. Pierce *vs.* Same.

Hampshire. Sept. 20. — Nov. 22, 1887. C. Allen & Holmes, JJ., absent.

Under the Pub. Sts. *c.* 153, § 8, a ruling of the Superior Court, sustaining a demurrer to a declaration in an action at law, and ordering judgment for the defendant, may be revised by this court on a bill of exceptions.

The declaration in an action for libel alleged, in the first count, that the defendant falsely and maliciously accused the plaintiff of conspiring with P. to defraud the neighbors and friends of the plaintiff and P.; and that the defendant caused said false and malicious libel to be published in a certain newspaper, as follows: "As to the E. Company, I doubt not all are willing it should pay a fair dividend, six per cent, even ten per cent, on the actual value of the plant. Here comes the rub, when the N. Company was capitalized for $40,000 its actual value was not $15,000. It was a plan for the T. Company to make a good sale, as no profit could be made with the sharp, bitter competition of the S. Company in the field, and it was a scheme by which certain parties (meaning the plaintiff and said P.) attempted to make $20,000 or more by buying a property worth in the neighborhood of $15,000 and capitalizing it for $40,000, and by selling stock to their neighbors and friends (meaning the neighbors and friends of the plaintiff and said P.) which was more than half water (meaning that more than half of the par value of said stock represented no assets and was of no real value). In fact, the T. plant at the time it was sold and capitalized for $40,000 was not worth near $15,000, as a large sacrifice had to be made, and was made by the projectors (meaning the plaintiff and said P.), who dare not force the loss of removing the S. competition on the stockholders after making 100 per cent and more on the stock sold." The second count alleged that the plaintiff was engaged in business in the city in which the newspaper was published; and that the defendant caused to be published in said newspaper "a false and malicious libel concerning the plaintiff, whereby the plaintiff was greatly injured in his

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trade, business, and employment;" and set out the publication annexed to the first count. *Held*, on demurrer, that the declaration was insufficient, in failing to apply the alleged libellous words to the plaintiff, or to show in what sense they were used.

TWO ACTIONS OF TORT. The declaration in the first case contained two counts.

The first count was as follows: "The plaintiff says the defendant falsely and maliciously accused the plaintiff of conspiring with Chauncey H. Pierce of said Northampton to defraud the neighbors and friends of said plaintiff and said Pierce, and the defendant caused said false and malicious libel to be published in a newspaper published in said Northampton, called the Hampshire County Journal, a copy whereof is hereto annexed, viz.: 'As to the Electric Light Company, I doubt not all are willing it should pay a fair dividend, six per cent, even ten per cent, on the actual value of the plant. Here comes the rub, when the Northampton Electric Light Company was capitalized for $40,000 its actual value was not $15,000. It was a plan for the Thomson-Houston Company to make a good sale, as no profit could be made with the sharp, bitter competition of the Schuyler Company in the field, and it was a scheme by which certain parties (meaning the plaintiff and said Pierce) attempted to make $20,000 or more by buying a property worth in the neighborhood of $15,000 and capitalizing it for $40,000, and by selling stock to their neighbors and friends (meaning the neighbors and friends of the plaintiff and said Pierce) which was more than half water (meaning that more than half of the par value of said stock represented no assets and was of no real value). In fact, the Thomson-Houston plant at the time it was sold and capitalized for $40,000 was not worth near $15,000, as a large sacrifice had to be made and was made by the projectors (meaning the plaintiff and said Pierce), who dare not force the loss of removing the Schuyler competition on the stockholders after making 100 per cent and more on the stock sold.'"

The second count was as follows: "The plaintiff says that he is engaged in the business of a merchant in said Northampton, and as a manufacturer in the city of Holyoke in the county of Hampden, in said Commonwealth; and the plaintiff says the defendant caused to be published in a newspaper published in

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said Northampton, called the Hampshire County Journal, a false and malicious libel concerning the plaintiff (a copy whereof is hereto annexed), whereby the plaintiff was greatly injured in his trade, business, and employment." Then followed a copy of the same publication set out in the first count.

The declaration in the second case was similar to that in the first.

The defendant demurred to the declaration in each case, assigning in each the following grounds of demurrer: "1. Because there is not set forth anything in either count which is by its natural import libellous, or which furnishes legal ground for an action for libel, or is actionable on any ground. 2. Because the matter set out, with accompanying averments, in either count, is not libellous as to the plaintiff, or at all; nor does it appear that the matter set out relates to the plaintiff."

The Superior Court sustained the demurrers, and ordered judgments for the defendant; and the plaintiffs alleged exceptions.

D. W. Bond, for the plaintiffs.

W. G. Bassett, for the defendant.

KNOWLTON, J. These two cases differ only in the kinds of business in which the plaintiffs are respectively alleged to have been engaged, and the opinion given in the first is equally applicable to the second.

The defendant contends that the only remedy for an erroneous ruling upon a demurrer is by appeal, and that the bill of exceptions should be dismissed. The usual and better practice is to bring to this court questions of law arising upon demurrers in the Superior Court by appeal, and not by exception. But by the Pub. Sts. *c.* 153, § 8, "in all cases, civil and criminal, ... a party aggrieved by an opinion, ruling, direction, or judgment of the court in matters of law may allege exceptions thereto," upon which the matter may be further heard. An appeal from a ruling or judgment upon a demurrer in an action at law in the Supreme Judicial Court will not lie, and the remedy for error in such a case is by exception only. *Cowley* v. *Train*, 124 Mass. 226. Appeals and exceptions taken upon interlocutory matters cannot be heard in this court until the proceedings at nisi prius to determine the legal rights of the parties appear to be ended. *Bennett* v. *Clemence*, 8 Allen, 431. In this action the record

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indicates that the order of judgment and the ruling sustaining the demurrer were simultaneous, and the exceptions then taken are properly before us.

The declaration is in two counts, the first to recover general damages for an injury to reputation from the publication of a libel, and the second charging an injury to the plaintiff's business from the same cause. In actions of libel and slander, it has always been held necessary, both in England and in this country, to allege the application of the words to the plaintiff, and, if in themselves they do not make their meaning clear, to allege also what will show their defamatory character. *Goldstein* v. *Foss*, 6 B. & C. 154. *Capital & Counties Bank* v. *Henty*, 7 App. Cas. 741. *Bloss* v. *Tobey*, 2 Pick. 320. *Carter* v. *Andrews*, 16 Pick. 1. *Goodrich* v. *Davis*, 11 Met. 473. The technical strictness of the common law has been relaxed by the English Common Law Procedure Act of 1852, 15 & 16 Vict. *c.* 76, and by the Massachusetts statute of the same year; but the general principle of our practice stated in the Pub. Sts. *c.* 167, § 2, which requires that the "substantive facts necessary to constitute the cause of action may be stated with substantial certainty, and without unnecessary verbiage," and the more particular requirement accompanying the form for a declaration in slander in the same chapter, that, where the natural import of the words is not otherwise intelligible, "the declaration should contain a concise and clear statement of such things as are necessary to make the words relied on intelligible to the court and jury in the same sense in which they were spoken," call for averments to show particularly how the plaintiff has been defamed. *Baldwin* v. *Hildreth*, 14 Gray, 221. *Chenery* v. *Goodrich*, 98 Mass. 224. *York* v. *Johnson*, 116 Mass. 482. *Brettun* v. *Anthony*, 103 Mass. 37. *Adams* v. *Stone*, 131 Mass. 433.

The first count does not allege, in accordance with the form in the statute, that the libel was published "concerning the plaintiff." In *Baldwin* v. *Hildreth*, *ubi supra*, it was decided, Chief Justice Shaw giving the opinion, that a declaration that a "defendant publicly, falsely, and maliciously accused the plaintiff of the crime of larceny, in words substantially as follows, 'He is a thief,'" was bad on demurrer, for want of an allegation that the words were spoken of the plaintiff.

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But the second count contains the allegation, and it becomes important to determine whether, with that, enough is set out to enable the plaintiff to maintain his action. The fundamental principle of our statute does not differ from that of the common law. The allegations must show, not only that the words apply to the plaintiff, but also in what sense they are used, and how they are defamatory. A statement that they were published "concerning the plaintiff" is insufficient, if from their character they do not intelligibly apply to him in a defamatory sense. The defendant is entitled to be informed by the declaration what is imputed to him, — what injury he is said to have inflicted, and how he is said to have inflicted it. If the meaning of the language is clear, and a charge that it was used of the plaintiff shows how it would naturally injure him, nothing more is necessary. But if it is ambiguous, and, with an allegation that it was published of another, it is not apparent whether it was applicable to him, or whether it was applicable in a defamatory sense, or, if it was, in which of possible different defamatory senses, all such additional facts must be alleged as will make its meaning clear. General allegations and innuendoes are not enough. In *Brettun* v. *Anthony*, *ubi supra*, it is said that "general allegations, that the defendant charged the plaintiff, falsely and maliciously, with the commission of a particular crime, accompanied by innuendoes, however broad and sweeping, will not aid a declaration otherwise imperfect." It is familiar doctrine that innuendoes do not enlarge, but merely restate in plainer terms, the meaning of the language which precedes them.

In the declaration in this case, the "concise and clear statement" called for by our statute, and answering to the inducement and colloquium of common law pleading, is wanting. The words alleged to have been published do not indicate their application to a particular person, — much less how they apply to him, or what relation he had to the matters to which they refer. It is impossible to determine with certainty from them how many actors participated in the transactions, or what parts they respectively took, or whether the conduct of any one was moral or immoral, innocent or guilty. Their meaning, as imputing what would expose one of whom they are alleged to

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have been published to hatred, contempt, or ridicule, is not intelligible, and can only be vaguely conjectured. The demurrer was, therefore, rightly sustained.

The gist of the charge in the second count seems to be the injury to the plaintiff's business; and damages for such an injury cannot be recovered without an allegation that the words were published of and concerning the plaintiff in his trade, business, or profession. *James* v. *Brock*, 9 Q. B. 7. *Odiorne* v. *Bacon*, 6 Cush. 185. But we prefer to rest our decision upon the broader ground already stated, and so we have not considered the questions that might arise in this aspect of the case.

Exceptions overruled.

CHARLES TAYLOR & another, executors, *vs.* HORACE TAYLOR & others.

Berkshire. Sept. 27. — Nov. 22, 1887. C. ALLEN & HOLMES, JJ., absent.

A testator by his will directed that his executor should "lay aside a fund of" a certain amount, of which his widow was to have the income during her life; gave the rest and residue of the estate to his brothers and sisters who might be living at his decease, to be divided equally between them; and provided that, "in case any of the legatees are indebted to me at the time of my decease, such indebtedness shall be deducted from the legacy given him or her, and the balance only paid over to such legatee, and if such indebtedness exceeds the legacy given them, I hereby discharge and release the surplus of such indebtedness." At the decease of the testator some of the brothers were indebted to him on promissory notes bearing interest. *Held*, that the executor was not entitled in his account to charge these brothers with interest after the testator's decease.

APPEAL, by the executors of the will of William Taylor, from a decree of the Probate Court, disallowing certain items in the executors' account, charging interest to the legatees named in the will on debts due from them to the testator at the time of his death. The case was heard by *Holmes*, J., and reserved for the consideration of the full court, on the following agreed facts:

The will of William Taylor directed his executors "to lay aside a fund of twenty-five thousand dollars," the income of

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which was to be paid to his widow for life. It also gave legacies to several persons, and contained the following clauses:

"The rest and residue of my estate I give, devise, and bequeath to my brothers and sisters who shall be living at the time of my decease, to be divided equally between them, share and share alike.

"In case any of the legatees are indebted to me at the time of my decease, such indebtedness shall be deducted from the legacy given him or her, and the balance only paid over to such legatee, and if such indebtedness exceeds the legacy given them, I hereby discharge and release the surplus of such indebtedness."

At the decease of said William, his brothers Horace Taylor and Franklin G. Taylor, and his sister Mrs. Mary T. Churchill, were severally indebted to him on their respective promissory notes, payable to him or order, on demand, with interest. There were four brothers and three sisters living at his death.

After setting aside the $25,000, to be held in trust for the widow during her life, and after paying the other small legacies, the executors had in their hands, from time to time, a small surplus, and made, during the life of the widow, three distributions therefrom to the four brothers and three sisters who were the residuary legatees: one in January, 1880, of $1000; one in April, 1881, of $500; one in September, 1881, of $526.28. These sums were paid over in money to those who were not indebted to the estate, and to those who were indebted the same sums were credited as an indorsement or part payment of such indebtedness due from them to the estate, as of the date of each of said distributions.

M. Wilcox, for the appellants, contended that interest continued to accrue as long as the principal, or any part, remained outstanding, and that the indebtedness to be deducted from the legacy of each of the debtors should be the principal, together with accruing interest, till paid or extinguished by having been deducted from or allowed out of their legacies in the course of the administration of the estate.

J. Branning, for the appellees, contended that interest on their indebtedness stopped at the death of the testator.

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MORTON, C. J. The question whether the executors have the right to charge interest, after the death of the testator, upon the debts due by his brothers and sisters, depends upon the intention of the testator, to be gathered from his will. *Bacon* v. *Gassett*, 13 Allen, 334. *Cummings* v. *Bramhall*, 120 Mass. 552.

The will gives legacies to several persons; directs that the executors "shall lay aside a fund of twenty-five thousand dollars," of which his widow is to have the income during her life; and devises and bequeaths the rest and residue of the estate to his brothers and sisters who may be living at the decease of the testator, to be divided equally between them.

It then provides that, "in case any of the legatees are indebted to me at the time of my decease, such indebtedness shall be deducted from the legacy given him or her, and the balance only paid over to such legatee, and if such indebtedness exceeds the legacy given them, I hereby discharge and release the surplus of such indebtedness."

The amounts due by the brothers and sisters at his death cannot, in strictness, be regarded as advancements; but it is clear that the testator did not intend that they should be treated as debts capable of being collected. At his death they ceased to be debts to be collected, and became amounts which were to be included in making up the residue to be divided, and then to be deducted from the separate shares of the legatees. The language first used implies that the debts to be deducted are to be taken as they exist at the death of the testator: "In case any of the legatees are indebted to me at the time of my decease, such indebtedness shall be deducted." "Such indebtedness" means the amount due at the decease of the testator. We think that the intention of the testator was that these debts should cease to be debts, and become at his decease in the nature of advancements. They therefore become substantially advancements, not by force of the statute nor by reason of the original character of the debts, but because they are made so by the will of the testator.

It follows that the executors are not entitled, in making up the residue, to charge, against the brothers and sisters of the testator who were indebted to him at the time of his decease, interest after his decease. *Decree affirmed.*

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COMMONWEALTH *vs.* WILLIAM E. BURROUGHS.
SAME *vs.* THOMAS B. BARTLETT.
SAME *vs.* MARGARET KENNEDY.

Worcester. Oct. 3. — Nov. 22, 1887. C. ALLEN & KNOWLTON, JJ., absent.

At the trial of a complaint for a violation of the law relating to intoxicating liquors, no exception lies to the refusal of the judge, after having put to the jurors the questions provided for by the Pub. Sts. *c.* 170, § 35, to ask them whether they are members of, or contributors to, any society or association having for its object the enforcement of the laws relating to intoxicating liquors.

THE FIRST CASE and THE SECOND CASE were complaints for keeping intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth.

THE THIRD CASE was a complaint for keeping and maintaining a certain tenement used for the illegal sale and for the illegal keeping of intoxicating liquor, the same being a common nuisance.

At the trial of each case, on appeal, in the Superior Court, before the jury were empanelled, the defendant moved the court to examine certain of the jurors specified by him, with a view to a challenge for cause with reference to their bias; and that the following questions might be put them for that purpose: "1. Are you a member of any Law and Order League, so called? 2. Do you contribute funds to any Law and Order League? 3. Are you a member of any society or association that has for its object, or one of its objects, the enforcement of the laws of the Commonwealth relating to the sale of spirituous and intoxicating liquors? 4. Do you contribute to any society or association which has for its object, or one of its objects, the enforcement of the laws of the Commonwealth relating to the sale of spirituous and intoxicating liquors?"

The presiding judge refused to ask the jurors these questions; but put to them the questions specified in the Pub. Sts. *c.* 170, § 35, which questions they answered in the negative; and the jurors remained in the panel.

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The jury returned a verdict of guilty in each case; and the defendant alleged exceptions.

J. Hopkins, for Burroughs.

J. R. Thayer, for Bartlett.

D. F. O'Connell, for Kennedy.

A. J. Waterman, Attorney General, for the Commonwealth.

DEVENS, J. The Pub. Sts. *c.* 170, § 35, provide that the court shall, on motion of either party in a suit, examine on oath each person who is called as a juror therein on certain subjects, and adds, "the party objecting to the juror may introduce any other competent evidence in support of the objection." The inquiries thus provided for were, in the cases at bar, made by the presiding judge. The defendants then moved that certain other questions should be submitted to the jurors, as they stated, with a view to a challenge for cause in relation to their bias, which questions the judge declined to put. It would be sufficient in these cases to say that replies to the questions themselves, however answered, would not have afforded any reason to reject the jurors. It would have been necessary to supplement them by evidence that the league or association of which the jurors might admit themselves to be members had, through some of its agents, initiated, or was then conducting, the prosecution of the individual defendants. The defendants neither offered, nor did they by their motions, or by any suggestion, propose to offer such evidence.

We are not, however, disposed to rest the matter upon so narrow a ground.

While the statute permits, after the statutory questions have been propounded, the party to a suit to introduce any other competent evidence, it was not intended to give him the right to submit the juror to an inquiry in the nature of a cross-examination, in order to ascertain if he could not thereby elicit something tending to show bias or prejudice on the part of the juror. The other competent evidence which he may of right introduce is that obtained from other sources than from an examination of this character. Undoubtedly the presiding judge, if he deems it desirable in determining whether a juror stands as impartial, may himself examine or permit an examination of the juror beyond the inquiries provided for expressly by the

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statute; but beyond these statutory provisions the whole matter of such examination is left to his sound judgment and judicial discretion.

The trials in the cases at bar occurred before the passage of the St. of 1887, *c.* 149.* It is unnecessary to consider how this statute will hereafter affect similar examinations.

Exceptions overruled.

COMMONWEALTH *vs.* JAMES F. MOORE.

Bristol. Oct. 25. — Nov. 22, 1887. C. ALLEN & KNOWLTON, JJ., absent.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, if the defendant has an innholder's license and also a license of the first class for the sale of intoxicating liquors, and the evidence for the government tends to show that the defendant sold intoxicating liquors on the Lord's day to several persons who went into his premises for the purpose of procuring and drinking such liquors, such persons are not "guests," within the meaning of the Pub. Sts. *c.* 100, § 9, *cl.* 2; and the defendant is not entitled to have the jury instructed as to the rights of an innholder to sell to his guests.

If a person licensed to sell intoxicating liquors, places or maintains curtains in the windows upon the licensed premises, in such a way as to interfere with a view of the business conducted thereon, or of the interior thereof, it is a violation of his license; and it is immaterial for what purpose he maintains the curtains.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the complainant testified that he was employed by a Law and Order League to obtain evidence against liquor sellers, and to prosecute such for illegal sales of intoxicating liquors; that the league furnished him with money to pay expenses; that he asked some sailors to visit the tenement in question with him, and ordered liquors for them, which he paid for out of money furnished by the league. *Held*, that the defendant was not entitled to have the jury instructed that the witness was not entitled to be believed, or that the jury should not convict upon such evidence.

COMPLAINT for keeping and maintaining a common nuisance, to wit, a certain tenement in New Bedford, used for the illegal sale and illegal keeping of intoxicating liquors, on April 1, 1886,

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* This statute, which took effect on October 1, 1887, enacts that "the examination of jurors provided for by" the Pub. Sts. *c.* 170, § 35, "may be made by the parties or their attorneys under the direction of the court."

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and on divers other days and times between that day and May 22, 1886. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The defendant was a licensed innholder, and also held a license of the first class for the sale of intoxicating liquors during the time charged in the complaint, which license contained the provision of the statute in regard to innholders.

The complainant, Jules Giquel, testified that he went to the premises described in the license, on Sunday, May 9, 1886, about noon, with one Partridge and three sailors, whom he and Partridge found in one of the public streets of New Bedford, and invited to go with them where liquor could be sold; that, after visiting one or more places, they came to the defendant's place; that the curtains to the front windows on the east side of the defendant's saloon were drawn so as to cover the entire windows, and the defendant stood inside the saloon, near the window just north of the door leading into the saloon; that as he, Partridge, and the three sailors stopped in front of the defendant's place, the defendant pulled the curtains aside, and moved his hand towards the gate leading to a rear door on the south side of the building, which they interpreted to mean to go into the gate into the yard and round the house; that they did so, and went into the defendant's place at the back door, and found in the saloon or bar-room some twenty-five other persons; that others came in and went out, some through the front door and some through the back door; that while they were in there five persons got whiskey, drank it, and paid for it; that two or three of the sailors who went with him got whiskey or rum, and he paid for it; that the curtains to the windows were drawn so as to cover the entire windows at the time of said sales.

The bar-room in which the sales were testified to have taken place was the front room on the first floor next to the street; and the windows above referred to were windows looking out of said room.

The complainant further testified, that he was employed with Partridge by the Law and Order League of New Bedford to obtain evidence against liquor sellers in New Bedford, and to prosecute such for illegal sales of intoxicating liquor; that they were furnished by said league with money to pay their expenses,

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and were paid by the day for their labors; that the money they paid out for liquor drunk and food eaten by the sailors was money furnished by said league.

Partridge testified to similar matters and things; and both he and Giquel testified that the windows to the saloon were about six feet from the sidewalk, and that the house was some three or four feet back from the line of the street; and another witness testified that, standing on the sidewalk in front of the house, one could see into the saloon only a few feet, and could see only down to the waist of a person standing near the window.

There was some other testimony as to Sunday, April 25, and May 2, in regard to the use of the saloon on those days. The defendant and his bar-tender were called, and testified, directly contradicting the evidence of Giquel and Partridge.

The defendant asked the judge to give the following instructions to the jury: "1. An innholder, under a license to sell intoxicating liquor, has a right to sell on any part of the Lord's day, night as well as day, in any part of his inn, to a guest. 2. He has a right to sell to a guest on any part of any day of the week. 3. A guest is one who has resorted to his house for either food or lodging, as lodger, or boarder, or for lunch. 4. One is a guest who goes into such a place for food alone, or for lodging alone, and he would be a guest if only for a lunch or for an hour's rest; and to such a person the innholder may sell intoxicating liquor under his license. 5. If one goes to an inn for food, and gets it, he may be furnished with liquor under a license to an innholder. 6. Upon Sunday a licensed innholder has a right to have screens or curtains on the windows on his premises in the room in which intoxicating liquor is usually sold, and the law does not apply on that day to an innholder. 7. If curtains to a window that were up would not cut off a view of the premises, or the business done within the room to a passer-by, because they were so high one could not see in, or for any other cause, then the license would not be void or the sale illegal. 8. If the curtains were up, but not for the purpose of preventing persons passing by in the street from obtaining a view within the rooms or a view of the business done therein, then it would not make the license void, or the sale for that cause illegal.

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9. Persons employed by an association or league to induce the defendant and others to sell liquor for the purposes of prosecuting the defendant and others for violations of their license, are not such persons as are entitled to belief, and a jury should not convict upon the testimony of such hired witnesses."

The judge declined to give the instructions requested, and instructed the jury as follows: "The license of the defendant as an innholder would be violated, if, in the building to which that license applied, he sold intoxicating liquors to persons not guests, who had resorted to that building, either for food or for lodging, between the hours of eleven o'clock at night and six o'clock in the morning, or on the Lord's day, or when the windows of the room in which defendant or his servants thus sold intoxicating liquors were so screened by curtains as to interfere with a view of the business conducted in that room, or with a view of the interior of that room. A person, who for a considerable and substantial period of time violates, in the sale of intoxicating liquors, or in the keeping of intoxicating liquors for sale, the conditions of his license in the building to which that license applies, may be convicted of keeping and maintaining that building, at times when that building is so used in the violation of that license, as a common nuisance."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

E. L. Barney, for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

MORTON, C. J. The instructions given were appropriate and sufficient.

The case made by the government was that the defendant sold intoxicating liquors on the Lord's day to several persons who went into his premises for the purpose of procuring and drinking liquor. Such persons were not guests within the meaning of the statute, and there was no occasion to instruct the jury, as requested by the defendant, as to the rights of an innholder to sell to his guests. *Commonwealth* v. *Hagan*, 140 Mass. 289.

The instructions requested as to curtains were properly refused. If the defendant placed or maintained curtains in his windows in such a way as to interfere with a view of the business

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conducted upon the premises, or with a view of the interior of the premises, it was a violation of his license, and it is immaterial for what purpose he maintained the curtains. *Commonwealth* v. *Worcester*, 141 Mass. 58. *Commonwealth* v. *Rourke*, 141 Mass. 321.

The last request of the defendant was properly refused. The court had no right to instruct the jury that the government's witnesses were not entitled to belief. The credibility of the witnesses on either side was a matter entirely for the jury, and the instruction requested would have been erroneous.

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM PRATT.

Bristol. Oct. 25. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

At the trial of a complaint for an unlawful sale of intoxicating liquor to a person unknown to the complainant, the defendant put in the testimony of one M., that he told the complainant, about a week before the complaint was made, the name of the person to whom the unlawful sale relied on was made. The complainant testified, in answer to the question whether he knew, when he made the complaint, the name of the person to whom the sale was made, that he did not know the man. On cross-examination, he testified that he did not remember that M. told him the name of the person who bought and paid for the liquor; that he could not say, and would not like to say, that he did or did not tell him the name of the person. *Held*, that the question was properly submitted to the jury, whether the allegation that the name of the person to whom the sale was made was unknown to the complainant was sustained by the evidence.

COMPLAINT, made on April 24, 1887, for an unlawful sale of intoxicating liquor to a person to the complainant unknown, on April 17, 1887. At the trial in the Superior Court, before *Knowlton*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

T. F. Desmond, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

DEVENS, J. The complaint contained an allegation of an unlawful sale of liquor by the defendant to a person unknown. The defendant at the trial put in evidence the statement of one

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Morancy, that he told the complainant, on April 17, the name of the person to whom the unlawful sale of liquor relied on was made. The complainant testified, in answer to the question whether, when he made the complaint, he knew the name of the person to whom the sale was made, that he did not know the man. On cross-examination, he further testified that he did not remember that Morancy told him the name of the person who bought and paid for the liquor; that he could not say, and would not like to say, that he did or did not tell the name of the person.

Upon this evidence, the court rightly refused the motion of the defendant to order the defendant acquitted, and submitted the case to the jury upon the inquiry whether the allegation that the name of the person to whom the sale was made was in fact unknown to the complainant was sustained by the evidence.

If the fullest credence be given to Morancy's testimony, it does not necessarily follow that, at the time of making the complaint, about a week after, on April 24, the complainant then knew and remembered the name of the person. The question before the court was not what the complainant might with reasonable diligence have ascertained, or what he ought to and might have known if he had remembered what had been previously told him, but what he actually knew. This was to be determined by the jury as a question of fact. The presiding justice could not rule, as matter of law, that, because the complainant had been once informed of the name of the person to whom the liquor was sold, it was known to him at the time of making the complaint.

For similar reasons, the defendant was not entitled to the second and fourth instructions asked.* *Commonwealth* v. *Sherman*, 13 Allen, 248. *Commonwealth* v. *Glover*, 111 Mass. 395, 401.

Exceptions overruled.

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* The second and fourth instructions requested were as follows: "2. The complainant is bound to describe the person by such name as was given to him. He must give the best name he can." "4. If the complainant was told, before making the complaint, that the person buying the liquor was Abe Taber, then he was bound to describe such person by such name in such complaint, if that was the best name he could give him."

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conducted upon the premises, or with a view of the interior of the premises, it was a violation of his license, and it is immaterial for what purpose he maintained the curtains. *Commonwealth* v. *Worcester*, 141 Mass. 58. *Commonwealth* v. *Rourke*, 141 Mass. 321.

The last request of the defendant was properly refused. The court had no right to instruct the jury that the government's witnesses were not entitled to belief. The credibility of the witnesses on either side was a matter entirely for the jury, and the instruction requested would have been erroneous.

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM PRATT.

Bristol. Oct. 25. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

At the trial of a complaint for an unlawful sale of intoxicating liquor to a person unknown to the complainant, the defendant put in the testimony of one M., that he told the complainant, about a week before the complaint was made, the name of the person to whom the unlawful sale relied on was made. The complainant testified, in answer to the question whether he knew, when he made the complaint, the name of the person to whom the sale was made, that he did not know the man. On cross-examination, he testified that he did not remember that M. told him the name of the person who bought and paid for the liquor; that he could not say, and would not like to say, that he did or did not tell him the name of the person. *Held*, that the question was properly submitted to the jury, whether the allegation that the name of the person to whom the sale was made was unknown to the complainant was sustained by the evidence.

COMPLAINT, made on April 24, 1887, for an unlawfu[l] intoxicating liquor to a person to the complainant on April 17, 1887. At the trial in the Superior [Court] *Knowlton*, J., the jury returned a verdict of g[uilty]. The defendant alleged exceptions, which appear i[n]

T. F. Desmond, for the defendant.

A. J. Waterman, Attorney General, for [the Commonwealth].

DEVENS, J. The complaint contained [a count] lawful sale of liquor by the defendant [to a person unknown]. The defendant at the trial put in evid[ence]

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Morancy, that he told the complainant, on April 17, the name of the person to whom the unlawful sale of liquor relied on was made. The complainant testified, in answer to the question whether, when he made the complaint, he knew the name of the person to whom the sale was made, that he did not know the man. On cross-examination, he further testified that he did not remember that Morancy told him the name of the person who bought and paid for the liquor; that he could not say, and would not like to say, that he did or did not tell the name of the person.

Upon this evidence, the court rightly refused the motion of the defendant to order the defendant acquitted, and submitted the case to the jury upon the inquiry whether the allegation that the name of the person to whom the sale was made was in fact unknown to the complainant was sustained by the evidence.

If the fullest credence be given to Morancy's testimony, it does not necessarily follow that, at the time of making the complaint, about a week after, on April 24, the complainant then knew and remembered the name of the person. The question before the court was not what the complainant might with reasonable diligence have ascertained, or what he ought to and might have known if he had remembered what had been previously told him, but what he actually knew. This was to be determined by the jury as a question of fact. The presiding justice could not rule, as matter of law, that, because the complainant had been once informed of the name of the person to whom the was known to him at the time of making the

s, the defendant was not entitled to the sec-
ructions asked.* *Commonwealth v. Sherman,*
mmonwealth v. *Glover*, 111 Mass. 395, 401.

Exceptions overruled.

* structions requested were as follows: "2. The
ibe the person by such name as was given to
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d to describe such person by such name in
e best name he could give him."

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COMMONWEALTH *vs.* MICHAEL J. MURPHY & another.

Essex. November 1. — 22, 1887. DEVENS & KNOWLTON, JJ., absent.

At the trial of a complaint against A. and B. for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, evidence was introduced showing that both defendants had been seen in and about the premises in question. The defendants contended that one defendant was in the employ of the other; and asked the judge to rule that, "if B. was employed by A. as an assistant, on wages, and did not act in the absence of A., nor at any time have sole charge of the premises, he cannot be convicted." The judge declined so to rule; but instructed the jury that, if B. assisted A. in keeping and maintaining the premises as a nuisance, he would be liable to conviction upon the complaint. *Held*, that B. had good ground of exception.

COMPLAINT to the Police Court of Gloucester, against Michael J. Murphy and David C. Godfrey, for keeping and maintaining a common nuisance, to wit, a certain tenement in Gloucester, used for the illegal sale and illegal keeping of intoxicating liquors, on October 1, 1885, and on divers other days and times between that day and March 26, 1886.

At the trial in the Superior Court, on appeal, before *Hammond*, J., evidence was introduced showing that both defendants had been seen in and about the premises in question. The defendants contended that one defendant was in the employ of the other; and requested the following ruling: "If Godfrey was employed by Murphy as an assistant, on wages, and did not act in the absence of Murphy, nor at any time have sole charge of the premises, he cannot be convicted."

The judge declined to give the instruction requested; but instructed the jury that, if the defendant Godfrey assisted Murphy in keeping and maintaining the premises as a nuisance, he would be liable to conviction upon this complaint.

The jury returned a verdict of guilty against each defendant; and they alleged exceptions.

H. P. Moulton, for the defendants.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

HOLMES, J. The jury may fairly have understood that they were instructed to convict the defendant Godfrey, although they

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should find that Murphy was the sole proprietor, and that Godfrey's assistance was only that of a servant, rendered in Murphy's presence, and without exercising any kind of control over the premises. The case therefore falls within *Commonwealth* v. *Galligan*, 144 Mass. 171, which was decided after the ruling excepted to. See also *Commonwealth* v. *Churchill*, 136 Mass. 148, 151. This is the only exception argued, and is admitted not to affect the defendant Murphy.

Exceptions of Godfrey sustained.
Exceptions of Murphy overruled.

COMMONWEALTH *vs.* JAMES CLARK & another.

Essex. November 1. — 22, 1887. DEVENS & KNOWLTON, JJ., absent.

A complaint against A. and B. for keeping and maintaining, at a time and place named, a certain tenement, "then and there used by said A. and B. as a house of ill-fame, resorted to for prostitution, lewdness, and for illegal gaming, and then and there used by said A. and B. for the illegal sale and for the illegal keeping of intoxicating liquor, said tenement, so used as aforesaid, being then and there a common nuisance," is sufficient, under the Pub. Sts. c. 101, § 6.

It is no objection to a complaint for keeping and maintaining a tenement used as a house of ill-fame and for the illegal sale and illegal keeping of intoxicating liquors, that the time of the continuance of the offence, as alleged in the complaint, extends beyond a period of six months.

At the trial of a complaint for keeping a tenement used as a house of ill-fame in G., a police officer testified that he visited the premises on a certain day, and in one of the rooms found two women in bed together, but no man with them, and in an adjoining room found another woman in bed, but with no man. The government then asked the witness, "What was the reputation of these three women for chastity in G.?" The defendant objected to this question, but the judge allowed it to be put, and the witness answered that it was bad. *Held*, that the defendant had no ground of exception.

At the trial of a complaint against A. for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, A. testified that he had nothing to do with the management or control of the premises, but that they were let to B., who alone conducted them during the period named in the complaint; that he, A., had never had any interest in any sale of liquor, or at any time on these premises. On cross-examination, the district attorney asked A. if he had had anything to do with keeping it before the first day named in the complaint; and A. answered that he had not. The district attorney was then allowed to put in evidence tending to contradict A. on this point,

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and to show expenditures for purchases for the premises for the four months preceding the first day named in the complaint, and was allowed to comment on this evidence in his argument to the jury. *Held*, that A. had no ground of exception.

If, at the trial of a criminal case, certain evidence for the government is admitted without objection, and is competent for some purposes, it is too late for the defendant to request the judge, in the course of the closing argument for the government, to instruct the jury that the evidence is incompetent for any purpose, and that the argument in relation to it should be disregarded by them.

COMPLAINT to the Police Court of Gloucester, against James Clark and William E. Wetmore, alleging that the defendants, on January 1, 1886, and on divers other days and times between that day and July 26, 1886, at Gloucester, "did keep and maintain a certain tenement, there situate, then and there used by said James Clark and William E. Wetmore as a house of ill-fame, resorted to for prostitution, lewdness, and for illegal gaming, and then and there used by the said Clark and Wetmore for the illegal sale and for the illegal keeping of intoxicating liquor, said tenement, so used as aforesaid, being then and there a common nuisance."

In the Superior Court, on appeal, before the jury were empanelled, the defendants renewed a motion to quash the complaint, previously made in the police court, assigning the following reasons therefor: "1. Because the same is uncertain, indefinite, and insufficient, and charges no offence in a sufficient, proper, and formal manner. 2. Because the complaint does not sufficiently inform the defendant of the offence with which he is charged, and does not identify the offence so as to protect him from a subsequent prosecution for the same offence, or enable the court to render a proper judgment upon it. 3. Because the same is double, and in one count purports to charge more than one offence. 4. Because the complaint does not properly describe the tenement or its location. 5. Because there is no such offence as that undertaken to be set forth in the complaint. 6. Because the complaint is in other respects uncertain, indefinite, and insufficient."

Pitman, J., overruled the motion; and the defendants excepted.

At the trial, Michael J. Sullivan, a police officer, was called as a witness for the government, and testified that the premises

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were at 18 and 20 Hancock Street, Gloucester, and known as "The Welcome Home;" and he was proceeding to testify to acts done, and in regard to the management and conduct of the premises, after July 1, 1886, and prior to July 26, when the defendant objected to this testimony, on the ground that the continuance could not properly be extended beyond the period of six months from January 1, namely, to July 1. The judge overruled the objection, and admitted the testimony.

Sullivan further testified that he visited the premises on July 13, 1886, and in one of the bed-rooms found two women in bed together, but no man with them, and also in the adjoining room found a woman in bed, but with no man. The government then asked the witness, "What was the reputation of these three women for chastity in Gloucester?" The defendant objected, but the judge permitted the question to be put. The witness answered that it was bad; and to this answer the defendant objected, and excepted to its admission.

The defence of the defendant Clark was, that the premises were not a nuisance, whoever kept them; and that he had nothing to do with the keeping and maintaining during the period covered by the complaint. The defendant Wetmore conceded and testified that he alone was the keeper and maintainer during the time covered by the complaint. Clark was a witness in his own behalf, and testified that his wife was the owner of the building; that he, as agent of his wife, leased the premises to Wetmore at $50 per month; that Wetmore managed and conducted the place during the period named in the complaint; that he had nothing to do with its conduct, management, control, or profits; and that he had never had any interest in any sale of liquor, at any time, on these premises, and was not in that kind of business. The district attorney, upon cross-examination, then asked the witness if he had run the place, or had anything to do with keeping it prior to January 1, 1886. This question was objected to, but the judge admitted it. The witness then answered that he had not. The district attorney then produced two books of account, purporting to be books of expenditures for purchases for "Welcome Home," at a time prior to January 1, 1886, and as far back as September, 1885, when it was contended by the government that the place was kept either alone or in

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part by one Coombs, with whom the defendant was then interested; and the district attorney then asked him in whose handwriting certain entries therein were. The question was objected to, but was admitted. The defendant admitted that said entries were his. The government then proceeded to ask the witness various questions, relating to his entries in said books, and to his connection with Coombs during the time that Coombs ran the place, all of which were objected to, but were admitted. These entries were largely of purchases of liquors, and of cash received. The government had not, up to this point, put the books in evidence, and disclaimed an intention so to do; but subseqently offered the books in evidence, and to their admissibility the defendant Clark objected. The judge overruled the objection, and admitted the books in evidence. The government, in arguing the case to the jury, commented upon the books and the entries therein, and exhibited and read the entries to the jury.

The district attorney, in arguing the case to the jury, commented on the management and proprietorship of the premises prior to January 1, 1886, and was proceeding to argue to the jury on the entries of the books aforesaid, and to contend therefrom that Clark was jointly interested with Coombs prior to January 1, when Clark's counsel, without interrupting the district attorney, passed to the judge in writing the following request for an instruction: "Neither of the books claimed to be put into the case by the government is competent for any purpose." Thereupon the judge passed back the paper with the statement thereon, that, not having been submitted until nearly at the close of the district attorney's argument, it was not received. A large number of requests for instructions had been submitted in writing by the defendant's counsel prior to the arguments, all of which the judge gave. The judge did not check the argument of the district attorney, or give any instruction whatever to the jury on the subject matter herein stated, nor was any request, oral or written, made that the judge should do so, except as above stated, nor was any exception taken to the refusals to give these additional instructions. The books were not sent to the jury-room, the judge remarking that he should not send them to the jury, unless the defendant's attorney so requested and desired.

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The witness Sullivan further testified that, on one occasion, he saw Clark late at night come from the depot on the arrival of a Boston train, accompanied by a woman, and go with her to the premises in question. Upon his own examination, Clark had admitted that he brought the woman from Boston as a housekeeper for the Welcome Home, but testified that he did so at the request of Wetmore. In arguing the case to the jury, the district attorney was proceeding to comment on this event, and on the woman as unchaste, when, without interrupting, the defendants' counsel at once passed in writing to the judge a request to give the following instruction to the jury: "The testimony in regard to the woman from Boston is incompetent for any purpose, and the argument of the government in regard to it should be disregarded by the jury." The judge declined to receive the request, for the reason stated in declining to receive the abovenamed request, and in the charge gave no instruction on the subject matter.

The jury returned a verdict of guilty against each defendant; and they alleged exceptions.

G. W. Searle, for Clark.

W. W. French & H. N. Woods, for Wetmore.

A. J. Waterman, Attorney General, for the Commonwealth.

C. ALLEN, J. 1. The motion to quash was properly overruled. The complaint was sufficient, under the Pub. Sts. *c.* 101, § 6. *Commonwealth* v. *Ballou*, 124 Mass. 26.

2. The objection that the time of the continuance of the offence, as alleged in the complaint, was too long, cannot prevail. The defendant cites no authority in support of his view that six months is the longest time that can be legally covered by a complaint. He might have moved for a specification of particulars. See *Commonwealth* v. *Giles*, 1 Gray, 466, where the offence was alleged to have extended over a period of sixteen months.

3. The testimony as to the reputation for chastity in Gloucester of the three women who were found in the house was competent. Their general reputation in Gloucester was fairly implied; and the question could not reasonably be supposed, as the defendant argues, to call merely for the individual opinion of the witness.

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4. It was entirely competent for the court to allow a general cross-examination of the defendant Clark as to his relations to the house prior to the time charged in the complaint. He had testified in chief, that "he had never had any interest in any sale of liquor, at any time, on these premises." The cross-examination was proper, both for the purpose of contradicting his testimony in chief, and also on more general grounds. *Commonwealth* v. *Haher*, 113 Mass. 207. *Commonwealth* v. *Kelley*, 116 Mass. 341. His entries in the books of account, and his connection with Coombs, were also competent, and might properly be commented upon in argument to the jury.

5. No request was made that the books be sent to the jury. The presiding judge virtually offered to send them out, if desired; and all objection to the omission to do so, even if otherwise tenable, was thereby waived.

6. The testimony of the officer, Sullivan, that he saw the defendant Clark come from the depot, on the arrival of a train from Boston, accompanied by a woman, and go with her to the premises, must be assumed to relate to a time within the period covered by the complaint. The testimony appears to have been admitted without objection; but, in the course of the closing argument of the district attorney, the defendant asked the court to instruct the jury that the testimony was incompetent for any purpose, and that the argument in regard to it should be disregarded by the jury. It was then too late to ask a ruling that the testimony was incompetent for any purpose. Besides, it was clearly competent, as tending to show the defendant's connection with the house, and the business carried on there. In reference to the suggestion of unchastity, we do not know that all the evidence is reported, and the request was not put on the ground that this suggestion was unfounded. The point taken was not that the argument went too far, but that the district attorney had no right to argue at all upon the testimony in regard to the woman. If a question of law arises for the first time during the closing argument of the district attorney, we should not wish to say that the defendant would have no right to present it in a proper manner to the court, and ask a ruling upon it; but, in the present case, the objection was substantially to the competency of testimony which had been admitted without objection.

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There was no occasion for the court to give any instruction to the jury upon this objection; and, in reference to the suggestion of the woman's unchastity, the bill of exceptions does not contain enough to show that it was the duty of the court to caution the jury that the suggestion was unwarranted. *Commonwealth* v. *Cunningham*, 104 Mass. 545. *Exceptions overruled.*

COMMONWEALTH *vs.* FRANK McGURTY.

Suffolk. November 21. — 22, 1887. DEVENS & W. ALLEN, JJ., absent.

At the trial of an indictment on the St. of 1884, *c.* 299, § 43, for altering a ballot cast for a certain officer at a municipal election of a city, secondary evidence of the character of the ballot, which has been destroyed by the city clerk, as required by § 26, is admissible.

At the trial of an indictment on the St. of 1884, *c.* 299, § 43, for altering a ballot cast for a certain officer at a municipal election of a city, if the evidence shows that the ballot came from the ballot-box which was actually used in the election, it is not necessary to show that the ballot has been cancelled by a mechanical device, as provided in § 10 of the statute.

An indictment on the St. of 1884, *c.* 299, § 43, for altering a ballot cast at a municipal election of a city for Nelson S. Wakefield for a certain office, by "drawing lines and marks across the words and name Nelson S. Wakefield," is sustained by proof that the words and letters "S. Wakefield" only were so erased by the defendant.

A ballot cast, at a municipal election of a city, for a candidate for an office, who is not elected, is a "ballot cast for any officer," within the meaning of those words in the St. of 1884, *c.* 299, § 43, prescribing a penalty for the fraudulent alteration of such a ballot.

It is no defence to an indictment on the St. of 1884, *c.* 299, § 43, for altering a ballot cast for a certain officer at a municipal election of a city, that the fraud was discovered, and the ballot was counted and returned for the candidate for whom it was intended to be cast.

INDICTMENT on the St. of 1884, *c.* 299, § 43,* alleging that the defendant, on December 14, 1886, at Boston, at the annual municipal election of said city, wilfully, maliciously, unlawfully, and with intent to cheat and defraud, altered a ballot then and

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* "Whoever, with intent to cheat or defraud, alters any ballot cast for any officer at any election held for the choice of public officers, ... shall be punished," &c.

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there cast for a certain officer, to wit, for Nelson S. Wakefield for alderman of said city, by then and there, with a certain lead pencil, "drawing lines and marks across the words and name Nelson S. Wakefield." Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows:

The government called as a witness a police officer named Comee, who testified that he was on duty on December 14, 1886, at precinct one of ward 25, Boston, where the defendant was an inspector; and that the defendant, while in the performance of his duties as such inspector, and while counting ballots, after the close of the polls, with a lead pencil, which he held in his right hand, drew lines and marks upon a certain ballot, over and across a certain letter and word upon said ballot, to wit, the letter and word "S. Wakefield;" and further testified as to the appearance of the ballot after said alleged alteration, and as to the lines and marks over and upon the letter and word "S. Wakefield."

The defendant requested the judge to rule that the witness could not testify as to what he saw the defendant then do, or to the marks or alteration on, or to the appearance of, said ballot after the alleged alteration, without the production of the ballot. The government introduced evidence, which was not controverted, that all the ballots cast at the municipal election in the city of Boston, in December, 1886, were destroyed by the city clerk, in January, 1887, as required by the St. of 1884, *c.* 299, § 26. The judge refused to rule as requested.

The government introduced other evidence, tending to show that, during the day, and while the polls were open, there were on duty at said precinct the defendant, as an inspector, the warden, named Hibbard, a clerk named Woods, and another inspector named Harris; that when the polls were closed, the ballots were emptied by said officers out of the ballot-box on to a table, for counting; and that the defendant, while counting a pile of ballots, made the alteration charged in the indictment. The defendant requested the judge to rule that there was not sufficient evidence in the case that the ballot alleged to have been altered was "cast," within the intent and purpose of the statute. The judge refused so to rule.

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There was evidence in the case that the name or word "Nelson" was not in any way touched or altered by the defendant, but that "S. Wakefield" only was marked over and altered by him. The defendant requested the judge to rule that there was a variance between the proof and the allegation of alteration in the indictment. This request was refused.

The government introduced evidence, which was uncontroverted, that Nelson S. Wakefield was the candidate for alderman at said election from the eleventh aldermanic district of the city of Boston, and was defeated; and there was no other evidence in the case that he held any office. The defendant requested the judge to rule that, on all the evidence in the case, Nelson S. Wakefield was not an "officer," within the intent and purpose of the statute. The judge refused so to rule.

It appeared in evidence, which was uncontroverted, that the warden, Hibbard, ordered that the ballot be, and it was accordingly, counted and returned for Nelson S. Wakefield. The defendant requested the judge to rule that the defendant had committed no crime, within the intent and meaning of the statute. The judge refused so to rule.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. Burke, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

C. ALLEN, J. 1. It was impossible to produce the ballot at the trial, because it had been destroyed by the city clerk, as required by the St. of 1884, *c.* 299, § 26. It is now objected, that such destruction must be deemed to have been the act of the prosecutor, namely, the government, and that therefore the government could not properly be allowed to introduce secondary evidence of what the ballot was. But a destruction of ballots, under this general provision of law, cannot be deemed a wrongful or negligent destruction of a document, or one which involves any fault upon the part of the government or its agents; and the case does not fall within the doctrine, which has sometimes been declared or implied, that a document which has been destroyed through the fault of the prosecutor cannot be proved by secondary evidence. See 3 Greenl. Ev. § 107; *Commonwealth* v. *Snell*, 3 Mass. 82; *Joannes* v. *Bennett*, 5 Allen, 169.

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2. It was not necessary to show that the ballot had been cancelled by a mechanical device, as provided in § 10 of the statute. Such cancellation is not essential to insure the counting of a ballot, since § 12 makes provision for the case where a ballot-box containing such mechanical device cannot be furnished. Besides, the evidence showing that the ballot came from the ballot-box which was actually used in the election would warrant the inference that it had been duly cast within the meaning of § 43.

3. The alteration was sufficient to sustain the indictment. If the ballot had been originally cast, with the erasure shown, it could not properly have been counted as a ballot for Mr. Wakefield. The erasure was sufficient to "alter" the ballot, so that the voter's intention would have been defeated if the fraud had not been observed or discovered. The name upon the ballot is to be taken as a whole. If the lines and marks drawn across it were sufficient to show an apparent intention upon the part of the voter to erase the name, so that the ballot would not be counted as a vote for Mr. Wakefield, that is sufficient to support the charge of altering the ballot by drawing lines and marks across the words and name "Nelson S. Wakefield."

4. The objection that the vote for Mr. Wakefield was not a "ballot cast for any officer," because he was merely a candidate for office, and was not elected, cannot prevail. The statute merely uses a short form of expression, and the meaning is not open to doubt; otherwise the statute would only apply to existing officers who might be candidates for re-election. The phraseology of "voting for any officers to be then chosen" is common and familiar in the legislation of this Commonwealth. Pub. Sts. *c.* 7, § 55. Gen. Sts. *c.* 7, § 28. See also St. 1884, *c.* 299, § 41.

5. The fact that the fraud of the defendant did not succeed, and that, by direction of the election officer, the ballot was counted and returned for Mr. Wakefield, cannot avail the defendant in defence to the indictment. The ballot was altered with intent to cheat and defraud, although the fraud was discovered at once. *Exceptions overruled.*

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JOHN W. FRENCH *vs.* CONNECTICUT RIVER LUMBER COMPANY.

Hampshire. Sept. 29. — Nov. 23, 1887. C. ALLEN & HOLMES, JJ., absent.

A corporation purchased all the property of another corporation, and all the shares of its capital stock except six. After this, the officers of the purchasing corporation were chosen officers of the selling corporation, and the six shares of stock were transferred to them. *Held*, that the purchasing corporation did not thereby acquire a right to do an act granted to the selling corporation by its charter, but which was contrary to the general laws of the Commonwealth.

The Sts. of 1871, cc. 285, 362, authorizing certain persons to construct booms across the Connecticut River, in such a way as not to obstruct the lumber of other persons, did not repeal by implication the Gen. Sts. c. 78, § 5, prohibiting the floating of logs on the said river unless the logs are formed into rafts.

A. owned and kept a public house and grounds, and in connection therewith owned a way to a navigable river, and a landing place on the river, by which persons had access to his house from the river. The river at A.'s landing was obstructed by sand, which was caused to be deposited there by B.'s boom above, and by logs which were stranded there while being floated down the river by B., whose acts were illegal. *Held*, that the diminution in A.'s business and profits caused by obstructing the river at his landing place, cutting off access to it from the river, and preventing persons from passing from the river to his house, constituted special and peculiar damage to him, for which he could maintain an action against B. *Held, also*, that evidence of the diminution in the number of visitors to A.'s house, and in the receipts and profits from them, caused by the acts of B. in obstructing the landing place, was competent upon the question of the loss occasioned to A. in his business. *Held, also*, that the judge properly refused to rule that A. could recover only for the expense of removing the obstructions.

TORT for damages alleged to have been occasioned to the plaintiff by the wrongful acts of the defendant in obstructing the Connecticut River at the plaintiff's landing place on said river. Writ dated February 5, 1883. At the trial in the Superior Court, before *Barker*, J., the jury returned a verdict for the plaintiff in the sum of $406.67; and the defendant alleged exceptions. The facts appear in the opinion.

D. W. Bond, for the defendant.

J. C. Hammond, for the plaintiff.

W. ALLEN, J. The plaintiff owned and kept a public house and grounds on the summit of Mt. Holyoke, and in connection therewith owned a way to the Connecticut River, and a landing

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place on the river, by which persons had access to his house from the river. The defendant floated large quantities of logs down the river. The river at the plaintiff's landing was obstructed by sand, which was caused to be deposited there by the defendant's boom above, and by logs which were stranded there while being floated down the river loose, and not in rafts, by the defendant.

The plaintiff contended, and the court ruled, that the defendant had no right to float logs down the river except in rafts. We think that this ruling was right. It may be assumed that the Connecticut River is a public highway, in which the public have a right to float logs, either singly or connected together, unless prohibited by statute. To sustain the ruling, it must appear that some statute prohibited the floating of logs except in rafts for the whole time during which the acts relied on by the plaintiff were committed. The period alleged in the declaration, and to which the evidence applied, is from June 1, 1880, to February 5, 1883.

The provisions of § 5 of the Gen. Sts. *c.* 78, by their reënactment in the Pub. Sts. *c.* 94 § 5, were in force until May 27, 1882. That section provided that "No person shall cause or permit to be driven or floated down Connecticut River any masts, spars, logs, or other timber, unless the same are formed and bound into rafts, and placed under the care of a sufficient number of persons to govern and manage the same so as to prevent damage thereby." A similar statute had been in force since 1815. Rev. Sts. *c.* 52, § 5. St. 1814, *c.* 150.

The St. of 1882, *c.* 274, which took effect on May 27, authorized the defendant to construct a boom between the confluence of the Chicopee and Connecticut rivers and the ferry next above (which is several miles below the lower of the booms before mentioned). Section 2 amended § 5 of the Pub. Sts. *c.* 94, so that it should not apply to that portion of the Connecticut River above its confluence with the Chicopee River. The same section provided for proceedings before the county commissioners by which the damages occasioned to the owners of ferries and boats by the floating by the defendant of logs, etc. not in rafts should be determined, and provided that, "In case neither party petitions to have such damages fixed, any person floating or

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driving masts, spars, or logs upon said river not formed into rafts and attended as provided in said section five shall pay all damages done by such floating or driving." It does not appear that any party has ever petitioned for damages.

The St. of 1883, *c.* 183, which modifies these provisions, did not take effect until after this action was commenced.

To control the plain provisions of these acts, the defendant relies upon the St. of 1871, *c.* 362, by which the Holyoke and Northampton Boom and Lumber Company was incorporated, with authority to construct a boom where the defendant's boom next below the plaintiff's landing place now is. The defendant contends that this statute gave by implication to the Holyoke and Northampton Lumber Company the right to float logs not in rafts to its boom, and that it has acquired the right from that company. The court below ruled that the defendant could not justify its acts under the authority which the former corporation may have had. As we think that this ruling was correct, there is no occasion to consider whether there is any ground for the contention that the statute gave any such right to the Holyoke and Northampton Lumber Company. The only ground on which it is contended that the defendant has succeeded to the right of the other corporation is, that it has purchased the property which was used, though not owned, by that corporation; that it has purchased all the capital stock of that corporation, except enough to make stockholders for officers; and that the same persons are officers of both corporations.* The court correctly left it to the jury to say whether the acts and business were those of the defendant, or of the other corporation.

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* The exceptions stated that the charter granted to the Holyoke and Northampton Boom and Lumber Company in 1871 was accepted, and a corporation formed thereunder, which has continued to hold its meetings to the present time; that the corporation placed a boom across the river below the plaintiff's landing place, and put saw-mills on land belonging to persons who were stockholders; that, in 1879, the defendant purchased from the stockholders four hundred and ninety-four shares of the capital stock of the Northampton Boom and Lumber Company, and also, from the owners thereof, the land on which the saw-mills stood; and that, after this, the officers of the defendant company were chosen the officers of the Holyoke and Northampton Boom and Lumber Company, to whom the remaining six shares of stock were transferred, one share to each officer.

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The defendant further contends that the Sts. of 1871, *cc.* 285, 362, (by which certain persons were authorized to construct a boom in the Connecticut River above Turner's Falls,) repealed by implication the Gen. Sts. *c.* 78, § 5, because they required the booms to be constructed so as not to prevent the passage of boats and lumber of other persons, and also required the defendant to boom logs and lumber of other parties. We see nothing in these statutes inconsistent with the provisions of the General Statutes: and the facts that the section of the General Statutes remained unrepealed, and was reënacted in the Public Statutes, and that the St. of 1882, *c.* 274, when authorizing the construction of a boom lower down the river by the defendant, recognized the section as in force, and applicable to the defendant by amending it, and making new provisions, seem conclusive against the position taken by the defendant. See *Harrigan* v. *Connecticut River Lumber Co.* 129 Mass. 580.

The plaintiff sought to recover for special and peculiar damages occasioned to him by the public nuisance. The verdict must have been rendered on the first count of the amended declaration, and the special damages are alleged in the amendment to that count as follows: "And thereby the way and access from said river thereto [to the plaintiff's landing place] was hindered and obstructed, and divers persons who would otherwise have resorted to the plaintiff's house and grounds, to the profit of the plaintiff, were hindered and prevented from so doing. And the plaintiff was injured in the use of his landing place, and in the use of his Prospect House and grounds for the purpose for which they were constructed and used." All the damages found by the jury were for damage to the business of the plaintiff. This renders immaterial the question whether the plaintiff, as mortgagor in possession, could recover damages for diminution of the value of the mortgaged estate by the nuisance. The diminution in the plaintiff's business and profits occasioned by obstructing the river at his landing place, cutting off access to it from the river, and preventing patrons from passing from the river to his house, constituted special and peculiar damage to the plaintiff, for which he could maintain an action. *Stetson* v. *Faxon*, 19 Pick. 147. *Harvard College* v. *Stearns*, 15 Gray, 1. *Haskell* v. *New Bedford*, 108 Mass. 208. *Brayton* v. *Fall*

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River, 113 Mass. 218. *Blackwell* v. *Old Colony Railroad*, 122 Mass. 1. *Lyon* v. *Fishmongers' Co.* 1 App. Cas. 662. *Wilkes* v. *Hungerford Market*, 2 Bing. N. C. 281. *Rose* v. *Groves*, 5 Man. & Gr. 613.

Evidence of the diminution in the number of visitors to the plaintiff's house, and in the receipts and profits from them, caused by the acts of the defendant in obstructing the plaintiff's landing place, was competent upon the question of the loss occasioned to the plaintiff in his business.

The court properly refused to rule that the plaintiff could recover only for what he had expended in removing the obstructions. It did not appear that it was possible for the plaintiff to have removed them. Certainly he owed no duty to the defendant to remove the logs and sand with which the defendant continued to obstruct the river. *Exceptions overruled.*

PUTNAM TOOL COMPANY *vs.* FITCHBURG MUTUAL FIRE INSURANCE COMPANY.

Worcester. Oct. 3. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

If, by the terms of a policy of insurance against loss by fire, the policy is to be void on the removal of the property insured without the written assent of the company issuing the policy, an agent of the company has no power by an oral agreement to waive this provision.

A policy of insurance against loss by fire contained a provision that the policy should be void on the removal of the property insured without the written assent of the company issuing the policy. The property insured was removed without such assent, and was afterwards destroyed by fire. After the fire, and when the officers of the company knew of the removal, they met the adjusters of the various companies in which the property was insured. The amount of the loss was discussed at this meeting, and a reduction of the sum covering the loss was agreed to by the insured, on the supposition that the company issuing the policy in question would pay its share of the loss. Subsequently the president of the company said that the loss would have been paid if the amount insured by his company had been no greater than that of other companies. *Held*, in an action on the policy, that the evidence was not sufficient to entitle the plaintiff to go to the jury on the question whether the officers of the company had waived the provision in the policy, or were estopped to claim the benefit of it.

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CONTRACT upon a policy of insurance, dated January 15, 1885, in the form prescribed by the Pub. Sts. *c.* 119, § 139, issued by the defendant to the plaintiff, and insuring it for the term of one year against loss by fire, to the amount of $2000, "on patterns contained in storehouse of Putnam Machine Company." By the terms of the policy it was to be void if, "without the assent in writing or in print of the company, ... the said property shall be removed." The case was sent to an auditor, who found the following facts:

The patterns when insured were on the premises of the Putnam Machine Company. About May 1, 1885, they were removed from there to the storehouse of a manufacturer in another part of the city. On October 16, 1885, they were injured by fire, and the amount of the loss was $3482.43.

There was no evidence that either the company, or any person acting or claiming to act in its behalf, assented in writing to the removal of the patterns. The plaintiff contended that it obtained a verbal or oral assent to said removal, and a waiver of the written assent called for by the contract. On this point the facts were as follows: The insurance was effected through Lockey and Allison, a firm of insurance agents doing business in Fitchburg, having a place of business not connected with the office of the defendant company, and acting in a similar capacity for six other mutual insurance companies and for several stock companies. Lockey and Allison were supplied from the office of the defendant company with a calendar, on which they were described as agents of the defendant company, and which was used by them as an advertisement, with the knowledge and consent of the defendant. The defendant supplied Lockey and Allison with blank applications, which were filled out by them, signed by the persons seeking insurance, and returned to the office of the company. If satisfactory to the company, a policy was made by the company and sent to Lockey and Allison; and they were authorized to receive the premiums, and settled with the company monthly. The rates were not made up by Lockey and Allison, but by the company.

The practice was, when there was any change in the policy, for the agent to send the policy, with an indorsement in writing of the change, to the company for its consent. Slight changes had

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sometimes been made by these agents, in writing, on the policy, which were afterwards ratified by the company, not, however, changing the substance of the contract, but correcting mistakes. As when a policy was incorrectly made payable to a bank, or when it was made payable to the insured, and should have been made payable to a savings bank. Such a change as the removal of the property from one location to another would ordinarily have been indorsed in writing by these agents, and taken to the company for their consent.

The risk was no greater where the property was burnt than at the place of its location when insured, and no additional premium would have been required by the company if it had been asked to consent to the removal.

Henry Allison, in his examination in chief, testified as follows: "Mr. Putnam came to me soon after the annual meeting of the Putnam Machine Company, April 8, 1885. He said they were not going to have castings made by the Putnam Machine Company, but had arranged with L. H. Goodnow. He said they should move the patterns to the storehouse over the office of Goodnow. We knew where it was. I said, 'All right, go ahead and move the patterns, I will take notice for the company; bring in your policies and have them indorsed. I do not remember about the rate, whether it is the same. I will come down and see whether it is necessary to make any change in the rate.' Nothing further was said, before the fire. He did not bring in the policies, and there was no indorsement permitting the removal."

This testimony was not substantially changed on cross-examination, but the witness added, that he did not notify the insurance company of the removal till after the fire, and that the reason he did not was because he forgot it.

George E. Putnam, the treasurer of the plaintiff, testified: "About May 1, I told Mr. Allison we were going to change our patterns to Goodnow's. He said, 'All right, go ahead and remove the patterns, and I will accept notice for the companies. Bring in your policies, and I will have them indorsed, and I will go down and see if there will be any change in the rate.' I did not take the policies to the office, and did not think of it after that, before the fire. I supposed Allison had the power to assent

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to the removal. Did not know the difference between a stock and mutual company as to power of an agent."

Immediately after the fire, the defendant was notified of the loss and of the facts as to the removal of the property, as above set forth, and afterwards the officers of the company met the adjusters of the various companies in which the property was insured. At this meeting the amount of the loss was discussed, and a reduction of the sum covering the loss was agreed to by the plaintiff, on the supposition that the defendant company would pay its share of the loss. The president of the defendant company, in conversation with Allison at one time, and with Putnam, for the plaintiffs, at another time, on being told that the other companies that had insured had paid their share, said that his company would have done so if the amount of their insurance had been no greater than that of the other companies.

The defendant company never waived its right to rely on the clause in their policy as to removal of goods, unless the foregoing facts constitute such waiver. The defendant had no knowledge that the property insured had been removed until after the fire.

The auditor found that Lockey and Allison were not authorized to assent to the removal of the property; that the defendant did not assent to its removal in writing, or otherwise; and that the policy was void, and the plaintiff could not recover.

At the trial in the Superior Court, before *Pitman*, J., the plaintiff offered to prove all the facts stated in the auditor's report, except his finding as to the authority of Lockey and Allison, and also offered to prove the following additional facts: At the time of his conversation with Allison, Putnam, the plaintiff's treasurer, believed that Lockey and Allison were the agents of the defendant, having authority to give the plaintiff permission to remove the insured property, and in removing said property he acted on said belief. The plaintiff asked to be allowed to go to the jury upon the questions involved.

The judge ruled that the jury would not be warranted in finding a verdict for the plaintiff; and directed a verdict for the defendant. The plaintiff alleged exceptions.

F. P. Goulding, for the plaintiff.

H. C. Hartwell, for the defendant.

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W. ALLEN, J. Lockey and Allison were special agents for the defendant, to receive and forward to it applications for insurance, and to receive from it and deliver to the parties policies of insurance, and to receive the premiums thereon. They were not authorized to make or to vary contracts of insurance. The word "agents," printed on the calendar furnished to them by the defendant, does not imply more than this; but if it were held to be an advertisement of them as general agents, it would not import authority in them to waive the express provision of the contract that notice of removal should be given in writing. *Kyte* v. *Commercial Assurance Co.* 144 Mass. 43, and cases cited. *Eastern Railroad* v. *Relief Ins. Co.* 105 Mass. 570.

It is not stated in the auditor's report that the officers of the defendant did anything at the meeting of the adjusters of the companies in which the property was insured which would amount to a waiver of the provision in the policy, or estop the defendant from claiming the benefit of it. It is found that the amount of the loss was discussed at the meeting, and that the plaintiff agreed to a reduction on the supposition that the defendant would pay its share of the loss; but it is not found that the defendant's officers took part in the discussion, or knew that the plaintiff supposed that the defendant would pay its proportion of the loss, or said or did anything to create that supposition. No facts are found, and none can be inferred, which raise the question whether the officers had at that time authority expressly or by their acts to waive the provision.

Exceptions overruled.

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GEORGE A. BIGELOW *vs.* SAMUEL H. CAPEN.

Worcester. Oct. 4. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

In an action of tort by a mortgagee of personal property, against an officer who had attached the goods as the property of the mortgagor, it appeared that the mortgage was conditioned to pay the sum of $1000 in one year, "as stated in my notes dated" a certain day; and that the demand, made in pursuance of the Pub. Sts. c. 161, § 75, on the defendant, was to pay the sum of $1000, "being the amount of two notes of $500 each, indorsed by me for the accommodation of" the mortgagor. *Held*, that oral evidence was admissible to show that the mortgage was intended to indemnify the plaintiff against liability as indorser of two notes of $500 each, signed by the mortgagor; and that the action could be maintained although the notes originally given had been renewed by other notes, also signed by the mortgagor and indorsed by the plaintiff, on delivery of which to the bank discounting the original notes the latter had been delivered to the mortgagor.

A demand in writing, made, under the Pub. Sts. c. 161, § 75, by a mortgagee of personal property upon an attaching officer, is not invalidated by including in the sum demanded the amount paid by the mortgagee for costs of protest of the promissory note secured by the mortgage, if the property attached is insufficient to pay more than the note alone.

TORT, against a deputy of the sheriff of Norfolk, for the conversion of certain personal property. The answer contained a general denial, and alleged that the defendant attached the property by virtue of a writ in favor of R. F. M. Atwood against William Burleigh, returnable to the Superior Court, which action was duly entered and is now pending.

Trial in the Superior Court, before *Staples*, J., who allowed a bill of exceptions, in substance as follows:

On October 1, 1885, William Burleigh executed to the plaintiff a mortgage of the property in question, which was duly recorded on October 3, 1885, and which contained this condition: "Provided nevertheless that if I, or my executors, administrators, or assigns, shall pay unto the grantee, or his executors, administrators, or assigns, the sum of one thousand dollars in one year from this date, with interest, as stated in my notes dated Oct. 27th, 1884, signed by me, then this deed, as also the aforesaid note, shall be void."

The defendant attached the property in question on October 12, 1885, as the property of said Burleigh.

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On November 17, 1885, the plaintiff made a demand in writing on the officer in respect to the attached property, containing the following: "I hereby demand of you the sum of one thousand dollars, being the amount of two notes of five hundred dollars each, indorsed by me for the accommodation of William Burleigh and protested for non-payment, and paid by me, with interest thereon from November 17, 1885, together with four $\frac{4}{100}$ dollars, costs of protest, which is the amount now due me, on a mortgage given to me by said William Burleigh dated October 1st, 1885, and recorded with the mortgages of personal property for the town of Needham, book 10, page 4, the said mortgage covering all the live stock, tools, farming implements, and dairy utensils and other property described in said mortgage, now held by you on attachment as the property of said William Burleigh, or which has been sold by you on said attachment." The defendant did not comply with the demand.

The plaintiff testified as follows: "I indorsed two notes for William Burleigh, each in October, 1884, one of which was discounted at the Mechanics' National Bank and one at the Worcester National Bank. I renewed the indorsements when the notes became due, the one at the Mechanics' Bank twice, the other once. I think the old notes were destroyed."

The notes last given in renewal were dated May 1, 1885, and July 6, 1885. Both of these notes were payable to the order of the plaintiff, and were indorsed by him. They went to protest at their maturity for non-payment, and the plaintiff paid one on November 10, 1885, with the fees of protest, amounting to $2.02; and the other on November 6, 1885, with the fees of protest, amounting to $2.02.

The plaintiff further testified as follows: "I received no interest or consideration for indorsing these notes. I did it to help Burleigh. The notes were delivered up to me on payment by me as aforesaid. At the time of the first indorsement, I received no security from Burleigh. In 1885, I visited Burleigh at his farm, and there spoke to him in reference to security. He gave me as security the personal property mortgage in question. The consideration of the mortgage was the indorsing of the two notes, $500 each. No note was given with the mortgage."

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On cross-examination, the plaintiff testified as follows: "I had a talk with Burleigh when the first note had become due; he told me he could not pay it, and it must be extended. I indorsed another to take up that first four months' note. I signed five different notes, three renewals and two original notes. I never asked him to deliver or return to me those old notes. I left the notes in his hands to take up the old notes, and these were never returned to me. Burleigh never paid me anything in respect to these transactions. When I first intimated to him that I wanted security, in the summer of 1885, I had renewed one note twice. At the renewal of the last four months' one, I had spoken to him about security."

Burleigh testified for the plaintiff, against the objection of the defendant, as follows: "The liability understood and intended to be secured by the mortgage was that on the outstanding indorsed notes, and there was no other liability. The one thousand dollars mentioned in the condition was intended to be the amount of the two $500 indorsed notes. The consideration of the mortgage was that of one thousand dollars for his indorsement. The plaintiff indorsed the first notes for me, I think, in October, 1884. I cannot fix the date, I think the first part of the month. These two notes were indorsed at the same time, in the afternoon. I had then arranged for the discount of them. I received the proceeds of the notes. I put the notes into the banks shortly after the indorsements. I think the indorsements were in the early part of October."

On re-direct examination, the witness, under the objection of the defendant, was allowed to testify as follows: "I intended to secure the plaintiff for indorsing those two notes by this mortgage, and there was no other liability between us."

The defendant asked the judge to rule that the demand on the officer of November 16, 1885, was insufficient in law; and that, on the facts and evidence, the action could not be maintained. The judge refused so to rule, and submitted the case to the jury under appropriate instructions.

The jury returned a verdict for the plaintiff, in the sum of $823.80; and the defendant alleged exceptions.

H. E. Fales, for the defendant.

D. Manning, Jr., for the plaintiff.

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DEVENS, J. Parol proof of extrinsic circumstances may be admitted to apply a description to the subject matter of a contract. If it appears that the description is not in all respects accurate, it may to a certain extent be rejected, and what remains alone regarded, if that be sufficient to identify it. *Pierce* v. *Parker*, 4 Met. 80. *Hall* v. *Tufts*, 18 Pick. 455. *Baxter* v. *McIntire*, 13 Gray, 168.

Where a note described in a mortgage of personal property has been renewed, this fact may be shown, and the security applied to the note as thus renewed. *Barrows* v. *Turner*, 50 Maine, 127. Conversely, where there has been a substitution for the original note which was the foundation of the liability of the mortgagor, and the parties to the mortgage describe the original note, either by accident or by mistake as to the liability, this error may be shown, and the security applied to the existing liability. In the case at bar, the original notes indorsed by the plaintiff were dated the latter part of October, 1884. These notes had been renewed once or twice, the plaintiff indorsing the renewals. It was competent for the plaintiff to show, as he did, by evidence, that, at the date of the execution of the mortgage, on October 1, 1885, the liability intended and understood to be secured by the mortgage was that on the then outstanding indorsed notes; and that there was no other liability to the plaintiff, the one thousand dollars mentioned in the condition being the amount of the two $500 indorsed notes. It was therefore a mistake, and an erroneous description of the notes intended to be secured, to state them as of the date of October 27, 1884, arising probably from the fact that the transactions between the plaintiff and Burleigh, the mortgagor, then commenced; but this would not invalidate the security, when it was shown that the liability of the plaintiff originated with them, and that the later notes were merely a substitution. Nor would it invalidate the plaintiff's security that the obligation of Burleigh was one to indemnify him for indorsing, rather than one to pay him the notes then outstanding. The plaintiff would, it is true, have no demand against Burleigh except after payment of them by himself. The plaintiff was the promisee of the notes, and it was the duty of Burleigh to pay them. If in form it is stated in the mortgage that Burleigh agrees to pay the

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plaintiff the notes, rather than to indemnify him against being compelled to pay them, the real character of the transaction will, as between the parties, be regarded. Nor is any injury done to third persons. They are informed of the exact amount of the claim of the plaintiff upon the property of his and their debtor, even if such claim is not described with entire accuracy. There is no evidence that, by this, any person has been misled; and we have no occasion to consider whether there may not be cases where, if one were misled by the carelessness or inaccuracy of another, the person so misleading might not be estopped thereby from proving the exact character of his transaction with the mortgagor.

As the mortgagor was bound to indemnify the plaintiff for signing these notes, it may well be contended that he properly included the fees for protest of the notes in his demand upon the defendant, and in stating the amount due to him, as he was compelled to do, under the Pub. Sts. *c.* 161, §§ 74, 75. This demand was substantially correct, and it is not vitiated by a slight mistake, even if such was made. *Harding* v. *Coburn*, 12 Met. 333. A demand is also good, though made for an amount larger than is due, if the amount due exceeds the value of the property. *Clark* v. *Dearborn*, 103 Mass. 335. An examination of the verdict shows such to have been the fact in the case at bar. *Exceptions overruled.*

ROBERT P. BATH *vs.* E. D. METCALF & others.

Worcester. Oct. 4. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A. was arrested wrongfully, without a warrant, on a charge of felony, by two police officers of a city, and taken to the lock-up. Afterwards the city marshal, having reason to believe that A. was innocent, and having made up his mind to release him, sent him, the assistant marshal taking part in such act, from the lock-up to the railroad station in the custody of an officer other than those who arrested him, who released him only when on a train, and just before it started. *Held*, that A. could maintain an action against the five officers jointly for the imprisonment between the lock-up and the train.

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HOLMES, J. This is an action for false imprisonment against seven defendants, five of whom the jury have found guilty. Of these five, the defendants Hadd and Wheeler made the original arrest, without a warrant, on a charge of felony. We cannot say that the evidence, if believed, showed that Hadd and Wheeler had reasonable grounds to suspect the plaintiff of being a pickpocket, (supposing the justification to be well pleaded,) whether the question was properly one for the jury, or was for the court, like other questions of reasonable cause. Compare *Rohan* v. *Sawin*, 5 Cush. 281; *Good* v. *French*, 115 Mass. 201; *Davis* v. *Russell*, 5 Bing. 354; *Hill* v. *Yates*, 8 Taunt. 182; *Mure* v. *Kaye*, 4 Taunt. 34; 2 Hawk. P. C. *c.* 12, § 18; 2 Inst. 52. If the original arrest was wrongful, those who made it were answerable for the subsequent detention of the plaintiff under it; *Murphy* v. *Countiss*, 1 Harring. 143; *Powell* v. *Hodgetts*, 2 C. & P. 432; and, although the officers who carried the plaintiff in custody from the lock-up to the railroad station, after they had determined to release him, would have been liable, even if the previous imprisonment had been lawful, we do not think this continuation of the unlawful imprison ment so remote that the jury could not properly hold Hadd and Wheeler responsible for it. See also *Roswell* v. *Prior*, 12 Mod. 635, 640.

The defendant Pettis was city marshal, and, whether responsible for the arrest and detention of the plaintiff in the lock-up or not, sent the plaintiff to the railroad station in custody, after he had reason to believe him innocent, and had made up his mind to release him. The defendant Wright, the assistant marshal, took part in sending the plaintiff to the station, and the defendant Graves was the officer who took him there, only releasing him when on the train, and just before it started.

As we have said, we think that, even if the arrest had been lawful, the officers would have had no right to prolong the imprisonment beyond the doors of the lock-up for the purpose of sending the plaintiff out of town, and would have been liable, whether they had a right to release him without bringing him before a magistrate or not. See *M'Cloughan* v. *Clayton*, Holt N. P. 478, 480; 1 Hale P. C. 592; *Brock* v. *Stimson*, 108 Mass. 520; *Phillips* v. *Fadden*, 125 Mass. 198; *Caffrey* v. *Drugan*, 144

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Mass. 294. The only purpose for which an imprisonment without a warrant can be justified, in circumstances like the present, is that further proceedings may be instituted in due form. *Rohan* v. *Sawin*, 5 Cush. 285. *Wright* v. *Court*, 6 Dowl. & Ry. 623, 624; *S. C.* 4 B. & C. 596. *A fortiori*, these officers are liable if the original arrest was unlawful, for then the whole detention under it was unlawful. *Aaron* v. *Alexander*, 3 Camp. 35. *Griffin* v. *Coleman*, 4 H. & N. 265. It thus appears that the evidence warranted a verdict against each of the defendants named, and against all of them jointly; and that the instructions asked to the contrary were properly refused.

If the arrest had been made upon reasonable grounds of suspicion against the plaintiff, the defendants Hadd and Wheeler could not have been held liable for a subsequent wrongful imprisonment in which they took no part. On the other hand, Graves, at least, was not answerable for the imprisonment before the plaintiff was taken from the police station to the train, as he took no part in that. *Aaron* v. *Alexander* and *Powell* v. *Hodgetts*, *ubi supra*.

It follows that a verdict could be found against the five defendants jointly only for the imprisonment between the lock-up and the train, and on the ground that the arrest was wrongful. We regret that it does not appear that these considerations were brought distinctly to the jury's attention. But we cannot say that they were not; the exceptions are only to the refusal of rulings which were properly refused; and, as the jury were fully instructed that they could not find a verdict against two or more defendants unless they found that all such defendants participated in the same imprisonment and were parties to a joint wrong, we must assume that the verdict went on the proper ground, and covered the proper time.

Exceptions overruled.

G. Wells, for the defendants.

F. W. Blackmer & E. H. Vaughan, for the plaintiff.

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CHARLES W. SEARS *vs.* MARY F. LELAND.

Worcester. Oct. 4. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

If a person attaches mortgaged personal property which is in the possession of the mortgagor under a conditional sale, the terms of which have not been complied with, and, upon the demand of the mortgagee, pays the amount due on the mortgage to the latter, who assigns to him all his right, title, and interest in the mortgage, such person cannot maintain a bill in equity against the mortgagee to recover the amount so paid by him, upon the ground that the payment was made under a mutual mistake as to the validity of the mortgage.

BILL IN EQUITY to recover the amount paid by the plaintiff upon a mortgage of personal property given by Eugene M. Worthing to the defendant, and by her assigned to the plaintiff, upon such payment, together with the amount of certain expenses incurred by the plaintiff. The defendant demurred to the bill for want of equity. Hearing in the Superior Court, before *Staples*, J., who sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court. The facts appear in the opinion.

W. A. Gile, for the plaintiff.

G. H. Mellen, for the defendant.

DEVENS, J. By the amended bill it appears that Worthing was in possession of the property mortgaged (which was afterwards attached by the plaintiff) under a conditional sale, although nothing had been paid thereon, and the conditions of such sale had not been complied with. The defendant, upon the attachment of the property by the plaintiff, demanded the amount due upon her mortgage; the plaintiff paid the same, and the defendant then assigned to him all her right, title, and interest in the mortgage. The plaintiff now claims to recover from the defendant the amount paid by him upon said mortgage, together with certain expenses to which he has been subjected in restoring the property to the true owner, upon the grounds that the mortgage was invalid, and that said payment was made under a material mistake as to the validity of the mortgage. Whether the plaintiff should pay this mortgage or not was a matter at his own option; and the defendant was compelled to

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accept such payment, or lose her rights by virtue of it. We do not perceive, upon the case as stated, that the mortgage was invalid as a security, even if it was in fact valueless.

The mortgagor, Worthing, having obtained property under a conditional sale, had a right to mortgage it, and, in the hands of the defendant, the security was a valid and subsisting one. He had the possession of the property, and the right to possession, and could dispose of the property with his right therein, even if the sale to him was liable to be defeated by non-performance of the conditions. *Day* v. *Bassett*, 102 Mass. 445. *Crompton* v. *Pratt*, 105 Mass. 255. Of the right which the defendant had to comply with the conditions of the sale she has been deprived by the act of the plaintiff.

But if this were otherwise, and if the mortgagor had no property or right in the articles mortgaged, the plaintiff has no ground of complaint against the defendant. The plaintiff obtained from the defendant an assignment of all her interest in the mortgaged property, but there was no warranty, and the words chosen were apt to express a conveyance of such right, title, and interest, if any, as she might have. Where the subject of a contract has no existence, as where two parties contract as to the sale of a horse, which, without the knowledge of either, is dead, the contract may indeed be rescinded. But this principle has no application where one voluntarily purchases such right, title, or interest in property as another may have, even if both parties are in error as to the extent or value of that title or interest, or even if in fact the seller has no right. The subject of the contract is such right, title, or interest as may exist.

Unless the plaintiff had satisfied this mortgage within the time prescribed by the statute, his attachment would have failed, as the mortgagor and his debtor were the same person. Pub. Sts. *c.* 161, §§ 74, 75. It was for him to determine whether it was for his interest to pay it and obtain the rights of the mortgagee. He cannot now complain that this right is of less value than he anticipated. He has received all he purchased. No fraud or misrepresentation on the part of the defendant is alleged, and it is not important that she supposed she was parting with a more valuable right than she in fact possessed.

Decree affirmed.

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EDWIN HOWE *vs.* STEPHEN SALISBURY.

Worcester. Oct. 5. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

While a bill in equity, brought by a mill-owner on a natural stream against the owner of a reservoir higher up on the same stream to restrain the defendant from preventing the flow of the water to the plaintiff's mill, and for damages, was pending, the defendant wished a hearing on the question of granting a preliminary injunction postponed, and the plaintiff agreed to this, on the defendant's promise that sufficient water should be allowed to flow to the plaintiff's mill in the mean time. *Held*, that the plaintiff could not maintain an action at law against the defendant for breach of this agreement.

CONTRACT. Writ dated October 5, 1885. The declaration alleged that, in consideration of the plaintiff having a certain suit in equity, then pending between him and the defendant, continued *nisi* for an indefinite time, the defendant, who was then in possession of a certain reservoir, on August 21, 1885, agreed to open the gates thereof sufficiently to allow enough water to flow therefrom to the plaintiff's mill, on the stream below, to run said mill, until the defendant, who was about to go away, should return and have the suit taken up. The declaration also alleged performance on the part of the plaintiff, and a breach on the part of the defendant.

Trial in the Superior Court, before *Staples*, J., who reported the case for the determination of this court, in substance as follows:

The plaintiff is the owner of a mill and of a water privilege about one mile below the reservoir hereinafter mentioned, said mill and reservoir being on the same natural stream. On August 18, 1885, the plaintiff brought a suit in equity in the Superior Court against the defendant, in his individual capacity and as executor of the will of Stephen Salisbury, deceased, praying among other things for an injunction to restrain him from holding back from the mill the natural flow of water of the stream, by means of a certain reservoir situate upon land of which Salisbury was then in possession as mortgagee for the purpose of foreclosure, and for damages for so doing. On August 19, 1885, notice to show cause and of a hearing upon the

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application hereinafter named issued to the defendant, upon application for a preliminary injunction to restrain the defendant as aforesaid, returnable on August 24, 1885. At the November sitting, 1885, of said court, an answer to the bill was filed by consent. At the December sitting, 1885, the replication and a request for issues to be framed to the jury were filed. Afterwards at said December sitting it was agreed that a master should be appointed, and trial by jury of issues was waived, and on May 5, 1886, a decree was filed appointing a master. The order or notice returnable on August 24 was served on the defendant on August 20, 1885.

The plaintiff's evidence tended to show that the defendant, on August 21, 1885, stating that he wished to go away, and would be unable to attend the hearing, agreed, in consideration of the plaintiff allowing the suit to be continued until his return, to allow sufficient water to run to the plaintiff's mill from the reservoir, until the defendant could return and have the suit in equity heard; that the case was continued; that, for a week after August 21, 1885, water was allowed to flow from the defendant's reservoir to the plaintiff's mill, and after that such flow was stopped; and that the plaintiff suffered damages in consequence thereof.

At the request of the defendant, the judge ruled that the agreement relied on, if made, was connected with the equity suit and an incident thereof, and that the same could only be enforced and damages awarded for breach thereof in the equity suit; and ordered a nonsuit to be entered.

If the order was right, the nonsuit was to stand; otherwise, the case to stand for trial.

C. F. Stevens, for the plaintiff.

F. A. Gaskill, for the defendant.

W. ALLEN, J. The agreement declared on was an agreement in the suit in equity between the parties. The plaintiff sought in that suit to have the defendant enjoined against holding water in his reservoir so that it would not flow to the plaintiff's mill below, and also sought for damages for such detention of the water. The agreement related to proceedings in the former branch of the case. The plaintiff had made a motion for an interlocutory injunction, and a day had been assigned for a hearing

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upon the motion. The defendant desired a postponement of the hearing. The plaintiff contends that there were mutual promises; that the plaintiff promised that the hearing should be postponed, and the defendant promised that he would let down water from his reservoir to run the plaintiff's mill. But whatever the agreement may have been, it related only to the proceedings in the suit and to the motion for an injunction, and the remedies of the parties for a breach of it must be sought in the suit. The agreement was intended to be an arrangement in regard to proceedings in the suit, and not to be the ground of an action at law. The plaintiff was seeking damages, and could recover in his suit for all he might sustain by the wrongful withholding of the water by the defendant, and it was clearly not within the scope and purpose of the agreement to provide for a separate action at law for a part of such damages, or to make the defendant liable for them, without regard to whether the detention was wrongful or of right. *Nonsuit to stand.*

KATE MULCHAHEY, administratrix, *vs.* WASHBURN CAR WHEEL COMPANY.

Worcester. Oct. 5. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

In an action for personal injuries occasioned to the plaintiff's intestate by the breaking of a machine upon which he was employed by the defendant, the evidence showed that the intestate was found, about ten minutes after the accident, with his body crushed and his bowels disrupted, and that, although breathing, he was unconscious, and died almost immediately in that state. The judge ruled that there was evidence to warrant the jury in finding that a cause of action accrued to the intestate in his lifetime, and survived to his personal representative; that there was no evidence to warrant the jury in finding that the deceased endured any conscious pain or suffering, and that the plaintiff was only entitled to recover nominal damages. *Held*, that the rulings were not inconsistent, and were correct.

TORT, for personal injuries sustained by the plaintiff's intestate, Richard Mulchahey, by the breaking of a piston rod of a

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steam hammer which he was engaged in operating, while in the employ of the defendant. Trial in the Superior Court, before *Staples*, J., who reported the case for the determination of this court, in substance as follows:

The evidence showed that the hammer was a large and heavy machine with a "ram," so called, which was elevated by steam and which dropped together with the piston rod, which was attached to it, when the steam was allowed rapidly to escape.

The plaintiff's intestate worked upon a small platform halfway up the frame of the hammer, and about six feet from the ground, and managed the lever by which the steam was let off and on and the machine was worked; another hand worked at the machine, handling the steel while hot, with appliances, under the hammer on an anvil, and determined the force of the blow, whether light or heavy, by directing the man at the lever. The steam cylinder was upright and over the frame of the hammer, and the accident was caused by the breaking of the piston rod in the "ram," so that when the steam was let into the cylinder the piston-head and rod blew upward and out, struck the beam overhead, and fell to the ground, injuring the intestate.

The evidence tended to show that the intestate was struck by the falling rod. There was no witness to the occurrence who could give an exact account of the accident. The evidence of those who described it tended to show that, when the rod was blown out, the steam escaped into the building, which was a large shop open to the roof with the earth for a floor, filling all that part near the hammer with steam so that nothing could be seen for the time. The hands, including all who were near and who testified, ran out of doors at once, and returned as they found it safe to do so. The hand who worked with the deceased on the hammer ran out of one door, around the building, and in at another door opposite the boilers, and assisted in shutting the steam off. until which time it was escaping. The first persons who saw the deceased went to him after the steam had cleared away. The lapse of time up to this point was variously described by witnesses as follows: "as much as five minutes after the steam was shut off;" "about ten minutes after" (the noise of the blowing out).

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The evidence also tended to show that the intestate was carried by some men into the office of the works, at the other end of the works and on the street, where he died in a few moments, without speaking or recognizing anybody.

The following is all the evidence from the witnesses as to what they observed of the injury and condition of the intestate.

The plaintiff testified as follows: "I saw him after he was hurt, lying in the office. He was then dead; quashed in his body."

Annie Wood testified as follows: "I saw him on the counter in the office breathing his last. I saw the drooping and falling of the chin that always occurs in a person when dying, that I ever saw die; he was just gasping. I went out before they would say he was dead, but it was evident from his appearance that he was dying."

Daniel Mulchahey testified as follows: "I just saw my brother breathing up and down in the office. I saw only one gasp, and turned away. I stood looking at them when they picked him up, and carried him to the office."

John Mulchahey testified as follows: "The steam had gone away when I went to the hammer. I saw him lying on the ground, lying down breathing. I put my head down and asked him if he knew me, and he made no answer. I did not help to take him in. I started back to the shop. I could not tell where he was struck. I observed a little cut on the temple. I did not see him again till he was dead. I understood his bowels were burst open. I stooped down and tried to speak to him; there was no answer at all; he was breathing, but very hard. He was puffing, a kind of gasp, as though he was in a death struggle. His body was burst, and his bowels were burst out."

James Clifford testified as follows: "When I got back after the accident, the steam was shut off. I helped to shut it off. I did not shut it off alone. I went right to the hammer, and I saw Mulchahey lying down. There was somebody there with him, and I believe had hold of his head. Then I looked right up to see if it had done any injury overhead, so the men would be safe, and when I came to look around again he was taken to the office. The only injury I saw at the time was the marks on his face, I will not be positive which side. I did not look at

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him any length of time. He gave no signs of life when I looked at him."

William A. Eager testified as follows: "I saw some one lying under a broken shaft almost dead, and immediately I saw two or three persons carrying Richard Mulchahey in the front part of the mill office, when he died almost immediately in my presence. He had been struck by a piston, or steel shaft, while he was working in the company's works. I did see him while he was unconscious under the shaft, before any one could have approached him, and just the moment he had been struck by the piston. The limbs of the poor man were all bruised, and his bones were broken. Every one at the time was satisfied that the man had been killed by the piston or shaft while he was working."

Frank N. Olin, superintendent of the defendant's works, testified for the defendant as follows: "I heard an explosion of steam, — a noise. I got to the hammer about as quick as I could. I went to him, and took hold of his hands and spoke to him, and he seemed to be lifeless; he made no move. I did not assist in carrying him into the office; observed a sort of gurgling in his throat. It must have been five or ten minutes before the body was taken up and carried in there. He did not bleed badly. He had a mark on his temple that bled a little. I did not look at his body; he had his clothes on. I did not see blood flow out in front of the office. I stayed in the office when they put him in the ambulance. He was crushed in the body. He was struck on the head."

Charles McFarland testified for the defendant as follows: "I was the first man to get to Mulchahey. I went over and took his hand. I noticed a cut on the side of his head. It was bleeding a little. I noticed no injury to any other part of the body. He had his clothes on, all but his cap. He laid side of the piston, probably two feet from it. I took hold of his hand and felt of his pulse, and found no pulse there. I went and lifted his head up, stooping down on one knee, put my hand under his head. I spoke to him and said, 'Don't you know me, Richard? here 's your wife, do you know me?' He made no answer. His wife was not there; I said that to attract his attention. I saw no motion, except a convulsive motion. His eyes were glassy and set. I stayed with him till he died."

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At the conclusion of the evidence, the judge ruled that there was evidence to warrant the jury in finding that a cause of action accrued to the intestate in his lifetime, and survived to his personal representative; that there was no evidence in the case to warrant the jury in finding that the intestate endured any conscious pain or suffering; and that, upon the evidence, the plaintiff was only entitled to recover nominal damages, if the defendant was liable. The defendant, in view of this ruling, submitted to a verdict for nominal damages, the plaintiff excepting to the ruling as to damages. A verdict was accordingly returned for one dollar. If the ruling as to damages was correct, the verdict was to stand; if not, a new trial was to be granted upon the whole case, inclusive of liability.

W. S. B. Hopkins, for the plaintiff.

F. P. Goulding, for the defendant.

DEVENS, J. As the report of the presiding judge deals only with the question of damages, the evidence tending to make a case of negligence on the part of the defendant, and to show that an action therefor accrued to the intestate in his lifetime, is not stated. It is assumed by the report, that it would be sufficient to sustain a verdict.

The plaintiff was justified in contending, upon the evidence, that the body of the deceased was not found until some ten minutes after the accident; that, although then unconscious, he was still alive; and therefore that his death was not instantaneous. The ruling of the presiding judge was in accordance with this contention; but he further ruled that there was no evidence of conscious suffering by the intestate, and therefore that the plaintiff was entitled only to nominal damages. There was no evidence of any expenses or loss incurred before death by reason of the accident, which in itself might afford ground for substantial damages. *Bancroft* v. *Boston & Worcester Railroad*, 11 Allen, 34. The question is as to the correctness of the latter ruling.

The plaintiff deems these rulings inconsistent each with the other. We do not perceive the inconsistency. Instantaneous death and absence of conscious suffering after a fatal injury are readily distinguishable, and have been distinguished in our decisions. The continuance of life after the accident, and not

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insensibility or want of consciousness, is the test by which it is determined whether a cause of action survives. *Hollenbeck* v. *Berkshire Railroad*, 9 Cush. 478. But as the plaintiff can only recover such damages as she can show were sustained by her intestate, if he became instantly insensible, and so remained until his death, nothing can be recovered for any physical or mental suffering sustained by him. Nothing can be recovered by the administratrix on account of the death which subsequently ensued. *Bancroft* v. *Boston & Worcester Railroad*, *ubi supra*. In *Kennedy* v. *Standard Sugar Refinery*, 125 Mass. 90, where the intestate fell from a platform twenty feet in height, became unconscious on striking the ground, and, in one aspect of the evidence, remained so until his death, the plaintiff was allowed at the trial, by the judge at *nisi prius*, to recover for mental suffering endured during his fall. It was held in this court that the burden of proof was upon the plaintiff to show that her intestate actually endured mental suffering during the fall, before she could recover damages on that account; that, as no proof was furnished of any mental suffering during the fall; and as the question whether he did suffer mental terror or distress was purely a matter of conjecture, no damages could be recovered on that account. Whether the person injured endured conscious suffering has sometimes depended upon the question whether his death was instantaneous, but the two inquiries are distinct. *Corcoran* v. *Boston & Albany Railroad*, 133 Mass. 507. *Tully* v. *Fitchburg Railroad*, 134 Mass. 499. *Riley* v. *Connecticut River Railroad*, 135 Mass. 292.

That an adequate cause of the intestate's death, and one which must be held to have produced it, is found in the crushing of his body and disruption of his bowels, must be conceded. Viewed in the most favorable light for the plaintiff, this certainly fails to show any conscious pain or suffering on the part of the intestate. When found, although breathing, he was unconscious. Upon this state of facts, even if it were possible that there was some brief conscious suffering, evidence of it is not afforded, and it is left purely conjectural. The presiding judge did not undertake to say, as the plaintiff urges, that, because ten minutes after the accident the victim of it could not speak and was unconscious, he might not have passed into

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that condition after brief but terrible suffering, but said, in substance, that the case did not afford evidence that he had suffered consciously. This was correct.

The plaintiff urges that the case at bar strongly resembles *Nourse* v. *Packard*, 138 Mass. 307; but the evidence here wanting was afforded in that case. The dead body of the intestate was there found under a heap of loose grain, and there was expert testimony that he died from suffocation, and that a person situated as he was would retain consciousness from three to five minutes. It was a reasonable conclusion that he lived in a state of conscious suffering for a few minutes after the fall of the grain upon him which caused his death.

Judgment on the verdict.

LUCY B. BRIGGS & another *vs.* WALTER S. BARKER.

Plymouth. Oct. 18. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

If an appellant from a decree of the Probate Court, who claims his appeal seasonably, gives due notice thereof, and duly files and serves on the adverse party his reasons of appeal, omits, through accident and mistake, to enter his appeal in this court at the proper time, he is not entitled, under the Pub. Sts. c. 156, §§ 9, 10, to maintain a petition to this court for leave to enter the appeal, filed more than a year after the decree of the Probate Court was rendered.

PETITION to this court, dated May 10, 1887, for leave to enter an appeal from a decree of the Probate Court, rendered on April 12, 1886, admitting to probate an instrument purporting to be the last will of Waters B. Barker. Hearing before *C. Allen*, J., who ruled that the petition was not seasonably filed, and that the appeal could not be entered; and the petitioners alleged exceptions, which appear in the opinion.

J. F. Simmons, for the petitioners.

D. E. Damon, for the respondent.

DEVENS, J. The appeal from the decree of the Probate Court was seasonably claimed, notice thereof was duly given,

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and the reasons of appeal duly filed and served on the adverse party. Through accident and mistake on the part of the appellants, the appeal was not entered at the June Rules, 1886, and the present petition was filed more than a year after the decree of the Probate Court had been rendered. The petitioners do not contend that they are entitled under any provision of the statute now to enter their appeal, but urge that the court may permit them so to do by virtue of its general equity powers.

The right to appeal from the decision of the Probate Court depends upon the statute, which, for obvious reasons, requires that it shall be exercised within a fixed reasonable time. It further provides such safeguards as are deemed necessary to avoid the consequences of any accident or mistake of a party in exercising his right. The Pub. Sts. *c.* 156, §§ 7, 8, provide when the appeal shall be claimed, when notice thereof shall be given, and when the same shall be entered in the Supreme Judicial Court, and, further, for the filing of the reasons of appeal and the service thereof upon the adverse party. Section 9 provides that, where "a person aggrieved omits to claim or prosecute his appeal, without default on his part," the Supreme Court of Probate may, if justice requires a revision of the case, permit him to enter and prosecute such appeal. Section 10 provides that such appeal shall not be allowed unless the petition is filed within one year after the passing of the decree or order complained of. Provision is made for petitioners who are without the United States, which has no application to the present petitioners.

Section 10 therefore distinctly forbids the allowance of the petition in the case at bar, if the petitioners have omitted to claim or prosecute their appeal, without default on their part, as more than a year had expired since the decree complained of was rendered, when the petition was filed.

The contention of the petitioners is that they have not omitted to claim or prosecute their appeal, and that the failure to enter their appeal in this court is not a failure to prosecute. They urge that this is merely an omission to take one step in the formality required by the statute. This contention cannot be maintained. It is a failure to prosecute where the party claiming to be aggrieved fails to do what is necessary in order

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to bring his appeal before the appellate court. He thus prevents the execution of the decree appealed from by the court below, or the entry of another decree by this court, unless the adverse party by some petition brings the case before it. As the petition was not seasonably filed, the court has now no authority to grant it. *Decree affirmed.*

COMMONWEALTH *vs.* CATHARINE HAYES.

Plymouth. Oct. 18. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

At the trial of a complaint against a married woman for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, she cannot, under the Pub. Sts. *c.* 169, § 18, *cl.* 1, testify to a private conversation with her husband, who managed the tenement as her agent, in relation to instructions which she gave him about the conduct of the business, for the purpose of showing that she acted in good faith in giving them.

At the trial of a complaint against a married woman for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the evidence tended to show that the defendant's husband conducted the tenement, which was a hotel, as her agent, that she did not live on the premises; and that he, acting according to her wishes, instructed the bar-keeper not to sell liquors in violation of her license. The judge instructed the jury as follows: "In considering whether the defendant acted in good faith in giving instructions as to the conducting of her business in the hotel, and intending that her instructions should be obeyed, the jury may consider the defendant's relations to and practical connection with the business of her hotel, her means and opportunities of knowing how her business was conducted there in the matter of selling intoxicating liquors, and what information her interest and duty in that matter would reasonably induce her to seek and obtain. An instruction would not be given in good faith, which the person giving it, from the nature of the matter to which that instruction applied, and the character of the persons to whom it was given, could not reasonably expect to be obeyed, and which he did not follow by any supervision or care, for the purpose of ascertaining if that instruction was obeyed." *Held*, that the defendant had no ground of exception.

At the trial of a complaint against a married woman for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the evidence tended to show that the defendant's husband conducted the tenement, which was a hotel, as her agent; that she did not live on the premises; and that he, acting according to her wishes, instructed the bar-keeper not to sell liquors in violation of her license. The judge instructed the jury as follows: "Nothing to the contrary appearing, the natural and just inference from a sale, by a servant employed in his master's shop, of his master's goods, there kept

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for sale, would be that such a sale was authorized by the master. If a sale of intoxicating liquor was made in the hotel, during the time alleged in the complaint, by any person employed by the defendant to conduct her business at that hotel, without the defendant's knowledge, and really in opposition to her will, and the defendant in no way participated in, approved, or countenanced such sale, and this is clearly shown by the defendant, the defendant would not be responsible for such sale." *Held*, that the defendant had good ground of exception.

COMPLAINT for keeping and maintaining a common nuisance, to wit, a tenement in Brockton, used for the illegal sale and illegal keeping of intoxicating liquors, on May 1, 1886, and on divers other days and times between that day and August 3, 1886. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

It appeared that during all of the time named in the complaint the defendant was the holder of a license of the first class for the keeping and selling of intoxicating liquors, and also of a license as an innholder, under the provisions of the Pub. Sts. *c.* 100; that the licenses were procured to be used and were used for the purpose of carrying on the business of an innholder and seller of intoxicating liquors in the Occidental Hotel, in Brockton.

The defendant offered evidence tending to prove that she in no way or manner managed, controlled, or directed said business at any time, but left the management, control, and direction thereof, and the employment of necessary help, to her husband, John Hayes; that she did not live in or near said hotel, but in another part of the city, that during all of the period named in the complaint she was upon the premises of the Occidental Hotel but three times, and then only between the hours of nine and ten in the evening, and for the purpose of meeting her husband and of going with him to her home; and that at no other time was she notified, directly or indirectly, of any proceedings whatever at said hotel in violation of the conditions or provisions of her licenses; and there was no evidence in the case that she personally knew of the same.

It also appeared that the bar-keeper employed at said hotel during the period covered by said complaint was employed by the defendant's husband; and there was no evidence that the defendant ever saw or spoke to him.

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There was evidence tending to prove illegal sales of intoxicating liquor by the bar-keeper in said hotel within the period named in the complaint.

There was also evidence tending to prove that the defendant's husband, in accordance with her wishes and with her knowledge, and upon her procuring said license to keep and sell intoxicating liquors, instructed the only person employed as a bar-keeper at said hotel during said period never to sell intoxicating liquor to minors or drunken men, or to any but guests of the house after eleven o'clock at night, or in any way to violate any of the provisions or conditions of said license, but to conduct the business at said hotel according to the provisions of said license in all respects; and that such instructions were reiterated to the bar-keeper two or three times a week during said period.

It appeared that the defendant's husband resided with her, and not at said hotel, but that he daily went to the hotel at about eight o'clock in the morning, and remained there until between nine and ten o'clock in the evening, when he left the same for his home.

All of the evidence relied upon by the government to show a breach of the conditions or provisions of said licenses related to acts happening between eleven o'clock at night and half past two or three o'clock in the morning, and to the sale of intoxicating liquors, and also to sales to persons other than guests upon the Lord's day.

The defendant's husband testified that his instructions to said bar-keeper were given in good faith, and with the intent that the same should be obeyed; and the defendant testified that she wished them obeyed.

The defendant testified in her own behalf, and was asked by her counsel what instructions were given by her to her husband, (no other person being present at the time she gave them,) that the bar-keeper at said hotel should not sell intoxicating liquors there in violation of the conditions or provisions of her license, and, for the purpose of showing her good faith, what were her reasons then given to her husband for such instructions. To this question the government objected, upon the sole ground that neither the husband nor the wife could testify as to a private conversation with each other; and the judge excluded it.

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The defendant asked the judge to rule as follows: "1. If the husband of the defendant, with her consent or by her direction, acting as her agent or as manager of the business at the Occidental Hotel during the time covered by said complaint, gave the bar-keeper full and proper instructions as to his duties under said license for the keeping and sale of intoxicating liquors, with proper warnings as to sales to all persons to whom, under said license, such liquors could not lawfully be sold, the jury are to regard such instructions as given by the defendant. 2. If the jury are satisfied as to the defendant's good faith as to the giving of such instructions and warning, it is immaterial whether her husband acted in good faith or not. 3. If the jury are satisfied that the defendant had only the bare legal proprietorship of the business at the Occidental Hotel, and took no control, direction, or management thereof, and knew nothing of any violations of law in carrying on said business, she is not liable under this complaint."

The judge declined to give the instructions asked for, but ruled as follows:

"1. Nothing to the contrary appearing, the natural and just inference from a sale, by a servant employed in his master's shop, of his master's goods, there kept for sale, would be that such a sale was authorized by the master.

"2. If a sale of intoxicating liquor was made in the Occidental Hotel, during the time alleged in the complaint, by any person employed by the defendant to conduct her business in that hotel, without the defendant's knowledge, and really in opposition to her will, and the defendant in no way participated in, approved, or countenanced such sale, and this is clearly shown by the defendant, the defendant would not be responsible for such sale.

"3. Did the defendant, in good faith, give instructions intended to be obeyed and enforced, that no sales of intoxicating liquor should be made in her hotel by any of the persons employed by her to conduct her business there, in violation of the conditions of her license, and did the defendant know that those instructions were disregarded by the persons so employed, in their management of her hotel, and the intoxicating liquors in it?

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"4. In considering whether the defendant acted in good faith in giving instructions as to the conducting of her business in the Occidental Hotel, and intending that her instructions should be obeyed, the jury may consider the defendant's relations to and practical connection with the business of her hotel, her means and opportunities of knowing how her business was conducted there in the matter of selling intoxicating liquors, and what information her interest and duty in that matter would reasonably induce her to seek and obtain.

"5. An instruction would not be given in good faith, which the person giving it, from the nature of the matter to which that instruction applied, and the character of the persons to whom it was given, could not reasonably expect to be obeyed, and which he did not follow by any supervision or care, for the purpose of ascertaining if that instruction was obeyed."

The jury returned a verdict of guilty; and the defendant alleged exceptions to the exclusion of the evidence offered, and to the clauses of the charge to the jury marked 1, 4, and 5.

Asa P. French, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

FIELD, J. The provision of the Pub. Sts. *c.* 169, § 18, *cl.* 1, that "neither husband nor wife shall be allowed to testify as to private conversations with each other," is not confined to conversations upon subjects which are confidential in their nature, and it includes conversations between them relating to business done by one as agent of the other. If the defendant could not be allowed to testify that she gave directions to her husband relating to her business, for the purpose of showing that they were given, she could not be allowed to testify that she gave them, for the purpose of proving that she acted in good faith in giving them. The evidence offered was rightly excluded. *Dexter* v. *Booth*, 2 Allen, 559. *Jacobs* v. *Hesler*, 113 Mass. 157. *Drew* v. *Tarbell*, 117 Mass. 90. *Brown* v. *Wood*, 121 Mass. 137.

The fourth and fifth instructions given relate to the good faith of the defendant in giving directions as to the management of her business. The presiding justice had already instructed the jury in conformity with the decision in *Commonwealth* v. *Wachendorf*, 141 Mass. 270. If from the nature of the business and the character of the servants employed in it, the defendant could not

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reasonably expect her directions to be obeyed, and if she took no care, and exercised no supervision, for the purpose of ascertaining that her directions were obeyed, it was competent for the jury to find that the directions were not given in good faith, and that the sales of intoxicating liquors on which the Commonwealth relied were made with her consent. It might be contended that she could not be convicted if she in fact expected that her directions would be obeyed, although this was not a reasonable expectation. We think that it was the duty of the defendant, if she intended to raise this question, distinctly to have called the attention of the court to it. The exceptions to this part of the charge are general, and must be overruled.

In *Commonwealth* v. *Wachendorf*, *ubi supra*, the defendant had a license, and the complaint charged that he unlawfully sold intoxicating liquors "between the hours of eleven at night and six in the morning," and it was said in the opinion "that the defendant was not liable criminally as a seller, when the sale proved was made by a servant, without his knowledge, in opposition to his will, and which was in no way participated in, approved, or countenanced by him," and *Commonwealth* v. *Nichols*, 10 Met. 259, was cited.

Commonwealth v. *Nichols* arose under the Rev. Sts. *c.* 47, § 2, and it was said in the opinion "that a sale by the servant, in the shop of the master, is only *prima facie* evidence of such sale by the master as would subject him to the penalty for violating the statute forbidding the sale of spirituous liquors without license; that the relation of these parties, the fact that the defendant was in possession of the shop and was the owner of the liquor, and that the sale was made by his servant, furnish strong evidence to authorize and require the jury to find the defendant guilty. . . . . Unexplained, they would be sufficient to convict the party."

In *Commonwealth* v. *Briant*, 142 Mass. 463, and in *Commonwealth* v. *Stevenson*, 142 Mass. 466, the complaints were for unlawfully selling intoxicating liquors to a minor, and the rulings which were held to be erroneous were to the effect that a sale of intoxicating liquors by a bar-tender in his master's shop, and in the regular course of his master's business, was *prima facie* a sale by the master, whether made to a minor or any other

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person. In *Commonwealth* v. *Briant*, it was said that, "although we should admit that a jury might be warranted in inferring that such a sale was authorized, it would not follow that a court could rule that there is a presumption of fact that it was so, which is the purport of the instruction fairly construed."

These last cases must be taken to have decided that, in complaints for unlawfully selling intoxicating liquors, it is a question of fact for the jury whether a sale by a servant in violation of a license was made by the authority or with the consent of his master, and that no presumption of law of any kind arises from the facts that it was made by the servant in his master's shop, in the ordinary course of the master's business, and from liquors owned by the master and there kept for sale. Evidence of these facts may be sufficient to warrant a jury in inferring as a fact that the sale was made by the authority or with the consent of the master, but the weight of this evidence and the inferences to be drawn from it are for the jury.

Whether evidence, if believed, is sufficient to warrant a jury in finding a defendant guilty, is a question of law; and if the presiding justice in this case had charged the jury that, "nothing to the contrary appearing, evidence of a sale by a servant, in his master's shop, of his master's goods there kept for sale, would, if believed, warrant the jury in finding that the sale was authorized by the master," the instructions would perhaps have been unobjectionable. The expression, that "the natural and just inference from" such a sale is that it "was authorized by the master," may be considered, either as an expression of an opinion by the justice that the jury ought to find, if nothing to the contrary appeared, that the sale was in fact authorized by the master, or as a strong statement of the law that they would be warranted in so finding. Whether the first clause of the charge ought to be held to be such an expression of an opinion upon a matter of fact as to require a new trial, we need not decide. The second clause of the charge, although not specifically excepted to, puts upon the defendant the burden of clearly showing that the sale, if made by a person employed by her to conduct her business in the hotel, was made "without the defendant's knowledge, and really in opposition to her will, and the defendant in no way participated in, approved, or countenanced such

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sale." The two clauses, taken together, may well have been understood by the jury to mean that the presumption was that a sale made by a servant, under the circumstances stated, was a sale authorized by the defendant, and that it was for the defendant clearly to show that the sale was made without her knowledge, and in opposition to her will, in order to escape criminal responsibility. It was wholly a question of fact whether the sales proved were made by the authority or with the consent of the defendant, and the burden was upon the government to prove this fact beyond a reasonable doubt. We think that the charge in this respect was erroneous.

Exceptions sustained.

COMMONWEALTH *vs.* ELMER TURNER.

Plymouth. Oct. 20. — Nov. 23, 1887. C. ALLEN, J., absent.

A captive fox is an "animal" within the Pub. Sts. c. 207, § 53.

A person who lets loose a captive fox to be hunted by dogs may be convicted of subjecting the fox to unnecessary suffering, under the Pub. Sts. c. 207, § 53.

A complaint alleged that the defendant had the custody of a fox, and knowingly and wilfully permitted the fox to be subjected to unnecessary suffering, by turning the fox loose to be hunted by dogs, in consequence of which the fox was hunted by dogs, and thereby subjected to unnecessary suffering. The evidence was that the defendant, in the presence of a number of men with dogs, let the fox loose within two rods of a piece of woods; that the fox ran into the woods, and was at once lost sight of; and that five minutes afterwards the dogs were let loose and ran after the fox; and there was no evidence that they were seen again that day. There was also evidence that, half an hour after the fox was released, a fox was found dead in the woods, a quarter of a mile away, with his side torn open. *Held*, that the evidence was sufficient to warrant the conviction of the defendant.

A formal defect in a complaint cannot be availed of for the first time in the Superior Court on appeal.

COMPLAINT, alleging that the defendant, on April 7, 1887, at Rockland, "was the person having the charge and custody of a certain animal, to wit, a fox, and did then and there, knowingly and wilfully, permit the said fox to be subjected to unnecessary suffering, by then and there, knowingly and wilfully, turning

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the said fox loose, to be hunted by divers dogs, in consequence of which turning loose of the said fox, as aforesaid, the said fox was hunted by divers dogs, and thereby subjected to unnecessary suffering as aforesaid."

At the trial in the Superior Court, on appeal, before the jury were empanelled, the defendant moved to quash the complaint, because there was no offence set forth therein known to the laws of this Commonwealth, and because the offence intended to be charged therein was not fully, plainly, and substantially set forth. *Thompson*, J., overruled the motion.

At the trial, the government offered evidence tending to show that the defendant, on April 7, 1887, on Beech Hill, so called, in the town of Rockland, having the charge and custody of a fox, let the same loose; that at this time there were persons, to the number of ten or twelve, present with dogs, which they held by chains or cords fastened to their collars; that the defendant, before that day, said he was going to have a fox-hunt on that day, and was called upon by an agent of the Society for the Prevention of Cruelty to Animals, and informed that he would be prosecuted if he had the fox-hunt, and the defendant promised said agent that he would not take the fox there. It was also in evidence that, at the time the defendant let the fox loose, he forbade those having dogs letting loose their dogs. It appeared that the fox was let loose within two rods of the woods upon Beech Hill, which cover many acres of heavy growth of timber and wood, with thick underbrush; that the fox immediately ran into the woods upon his release, and was at once lost sight of in the woods; that, about five minutes after the release of the fox, those present having dogs, or some of them, let them loose, and they ran after the fox into the woods; and there was no evidence that they were seen again that day.

There was evidence that, in about half an hour after the fox was released by the defendant, a fox was found dead in the woods, with his side torn open, about one fourth of a mile from the place where the one was released by the defendant.

The defendant asked the judge to rule that the evidence was not sufficient to warrant the jury in convicting the defendant. The judge declined to rule as requested, and submitted the case to the jury, under instructions not excepted to. The

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jury returned a verdict of guilty; and the defendant alleged exceptions.

L. A. Cook & W. J. Coughlan, for the defendant. 1. The complaint sets forth no offence known to the laws of this Commonwealth.

"The common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, because the destroying such creatures is said to be profitable to the public." 3 Bl. Com. 213. *Geush* v. *Mynns*, Cro. Jac. 321. *Gundry* v. *Feltham*, 1 T. R. 334.

The Rev. Sts. *c.* 54, § 1, authorized and encouraged the destruction of foxes, and allowed a bounty of fifty cents per head for them. And by § 3 towns were authorized to raise money to encourage the destruction of foxes "and any other noxious animals whatever." By the Pub. Sts. *c.* 27, § 10, towns may raise money to encourage the destruction of noxious animals. As the law countenances the killing of foxes and allows towns to offer bounties for their destruction, killing them by a lawful method is no offence. Hunting is the proper and lawful method by which to kill foxes. 3 Bl. Com. 214.

The common law right to hunt foxes still prevails, unless controlled by statute law, and there is no statute law restricting or affecting that right in this Commonwealth. The St. of 1886, *c.* 276, does not apply to foxes.

If hunting a fox is not an offence, *a fortiori* turning a fox loose to be hunted is no offence.

That § 53 of *c.* 207 of the Pub. Sts., under which this complaint was made, does not apply to wild or noxious animals, is evident from the wording of the section itself, and from the provision of § 56, in regard to the care of animals found in the custody of the person arrested.

2. The offence intended to be charged is not fully, plainly, and substantially set forth. There is no allegation that the defendant permitted the fox to be subjected to unnecessary torture or cruelty of any kind. It is not enough to allege "unnecessary suffering." If it were, every person who fishes with hook and line might be convicted of cruelty to animals. There is no allegation as to the time when "the said fox was hunted by divers dogs." There is no allegation that at the time "the

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said fox was hunted by divers dogs, and thereby subjected to unnecessary suffering," the fox was in the charge or custody of the defendant.

3. The court should have instructed the jury that the evidence was not sufficient to warrant the jury in convicting the defendant. There was no evidence that the fox was turned loose by the defendant to be hunted, the evidence showing that, when the defendant turned the fox loose, he expressly forbade those having dogs letting loose their dogs. There was no evidence that the defendant permitted the fox to be subjected to unnecessary suffering, or that he had any control over the fox at the time the alleged unnecessary suffering took place. There was no evidence of unnecessary suffering on the part of the fox. And there was no evidence that the fox found dead was the fox liberated by the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

W. ALLEN, J. The Pub. Sts. *c.* 207, § 53, provide that "Every owner, possessor, or person having the charge or custody of an animal, who cruelly drives or works it when unfit for labor, or cruelly abandons it, or carries it or causes it to be carried in or upon a vehicle, or otherwise, in an unnecessarily cruel or inhuman manner, or knowingly and wilfully authorizes or permits it to be subjected to unnecessary torture, suffering, or cruelty of any kind, shall be punished," &c. The complaint alleges that the defendant, at a certain time and place, "was the person having the charge and custody of a certain animal, to wit, a fox, and did then and there, knowingly and wilfully, permit the said fox to be subjected to unnecessary suffering" by turning it loose to be hunted by dogs, whereby it was hunted, and "subjected to unnecessary suffering."

The defendant excepted to the refusal of the court to rule that the evidence was not sufficient to warrant a conviction. The evidence tended to prove that the defendant let a fox loose from his custody in the presence of several dogs; that the fox ran into a thick wood, and disappeared; that about five minutes afterwards the dogs were let loose, and pursued the fox, and caught it and mangled it. The jury might have found that the fox was let loose by the defendant to be hunted by the dogs, and that the dogs were procured by him and were let loose by

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his direction in order that they should hunt the fox. The evidence is sufficient to prove these facts; the question is whether these facts constitute or prove the offence described in the statute.

It is objected that the statute does not include noxious animals; that there is no evidence that the fox was subjected to unnecessary suffering; and that there is no evidence that it was subjected to any suffering by the defendant, or while it was in the charge or custody of the defendant.

The word "animal" must be held to include wild and noxious animals, unless the purpose of the statute or the context indicate a limited meaning. There is nothing in the general purpose and intent of the statute that would prevent it from including all animals, within the common meaning of that word. The statute does not define an offence against the rights of property in animals, nor against the rights of the animals that are in a sense protected by it. The offence is against the public morals, which the commission of cruel and barbarous acts tends to corrupt. See *Commonwealth* v. *Tilton*, 8 Met. 232. It is as obnoxious to the reason of the statute wantonly to torture a wild animal, held in subjection by force, as to torture a tame animal.

The history and context of the statute show that all brute animals are intended. The Gen. Sts. *c.* 165, § 41, reënacting the Rev. Sts. *c.* 130, § 22, and in force until the St. of 1868, *c.* 212, was enacted, provided that "Whoever cruelly beats or tortures any horse, ox, or other animal, whether belonging to himself or another, shall be punished," &c. The St. of 1868, *c.* 212, contained particular provisions, which are substantially found in the Public Statutes. Section 1 provided for punishing "whoever shall overdrive, overload, overwork, torture, torment, deprive of necessary sustenance, cruelly beat, mutilate, or kill, or cause or procure" to be so treated "any horse, ox, or other animal, and whoever having the charge or custody of any such animal" shall unnecessarily fail to provide for it proper sustenance and shelter. Section 2 related to the owner or person having the charge or custody of "any horse, ox, or other animal," who permits it to be subjected to unnecessary torture or cruelty. Section 3 related to working or abandoning cruelly a disabled "horse, mule, or other animal." Section 4 was a general provision in

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regard to the transportation of "any animal." Sections 5–7 related to the transportation by railroad companies of "cattle, sheep, swine, or other animals." Under this statute it might have been contended that § 2 did not include wild or noxious animals; but the statute was repealed the next year, and the St. of 1869, *c.* 344, enacted in place of it, the first two sections of which were in the form in which they appear in the Pub. Sts. *c.* 207, §§ 52, 53. These two sections include the substance of the first four sections of the St. of 1868. Section 3 of the St. of 1869 included §§ 5–7 of the St. of 1868, relating to transportation on railroads. The St. of 1869 nowhere designated any particular animal, or species, but uniformly used the words "any animal" or "animals." Section 6 provided that "In this act the word 'animal' or 'animals' shall be held to include all brute creatures." This provision is not reënacted in the Public Statutes, apparently for the same reason that the provision immediately following it in the same section, that the words "owner," "person," and "whoever" should include corporations, was not reenacted, — because it was unnecessary. The word "animal," in its common acceptation, includes all irrational beings. It was used in that sense in the St. of 1869, and it is not conceivable that the Legislature intended to give a different meaning to the word in the reënactment of that statute in the Public Statutes.

The statute does not require either the allegation or proof of torture or cruelty, except as involved in unnecessary suffering, knowingly and wilfully permitted. It is argued that the fox is a noxious animal, which man may lawfully kill; that hunting it with dogs is a proper mode of killing it; and that therefore the suffering inflicted by that mode of killing is not "unnecessary" within the meaning of the statute. The statute does not apply to foxes in their natural free condition, but only when they are in the dominion and custody of man. The right to kill a captive fox does not involve the right to inflict unnecessary suffering upon it in the manner of its death, any more than the right to kill a domestic animal involves the right to inflict unnecessary suffering upon it, or cruelly to kill it. It cannot be said, as matter of law, that throwing a captive fox among dogs, to be mangled and torn by them, is not exposing it to unnecessary suffering.

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It is argued that there was not sufficient evidence to prove that the fox was in the custody or charge of the defendant when the suffering was inflicted upon it. It is not necessary to consider whether there was evidence of suffering from fear when the fox was in the custody of the defendant in the presence of the dogs, because we have no doubt that, by letting loose the fox for the purpose of being hunted by the dogs, the defendant permitted it to be hunted and permitted it to be subjected to all the suffering which it endured, and which naturally followed its being hunted in pursuance of that purpose. It was the act of the defendant while he had the custody of the fox that put it within the power of the dogs, and it is immaterial that they were restrained for five minutes before starting in fresh pursuit.

The objections to the complaint, which are not involved in the questions already considered, are for formal defects, of which the defendant could avail himself only by taking the objection before judgment in the District Court. Pub. Sts. *c.* 214, § 25. *Commonwealth* v. *Brigham*, 108 Mass. 457.

Exceptions overruled.

JOHN WINN *vs.* FREDERICK C. SANFORD.

Nantucket. Oct. 25. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

The surety on a joint and several bond, executed to a husband by his wife as principal, cannot avail himself, in defence to an action against him upon the bond, of the incapacity of the principal to contract with her husband.

CONTRACT against the surety upon the following bond, executed by Susan B. Winn as principal, and by the defendant as surety:

"Know all men by these presents, that we, Susan B. Winn, wife of John Winn, of Nantucket, as principal, and Frederick C. Sanford, of Nantucket, as surety, are holden and stand firmly bound unto John Winn, of Nantucket, above named, in the sum of three hundred dollars, to the payment of which to the said

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John Winn, or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators. The condition of this obligation is such, that whereas, in a settlement of differences between said John Winn and Susan B. Winn, it was agreed by said Susan B. Winn, and on her behalf, that she should give to said John Winn a bond, with surety, 'to release dower whenever requested, and make no further claim on said John Winn for any support or for any cause whatever.' Now therefore, if said Susan B. Winn shall, whenever requested, sign release of dower in any real estate of said John Winn, and shall make no further claim upon him for any support or for any cause whatever, then this obligation shall be void; otherwise it shall be and remain in full force and virtue."

Trial in the Superior Court, without a jury, before *Thompson*, J., who ruled, as matter of law, "that the bond sued on cannot be made the basis of any legal claim against the defendant; that, Mrs. Winn not being liable to her husband under it, the defendant is not liable;" and found for the defendant. The plaintiff alleged exceptions.

J. Brown, for the plaintiff.

L. L. Holmes, for the defendant.

DEVENS, J. It is true, as a general proposition, that the liability of a guarantor or of a surety is limited by that of his principal. But to this there are certain exceptions. Thus, where the principal is excused from liability for reasons personal to himself, and which do not affect the debt he has incurred or the promise he has made, the surety would not be entitled to the benefit of this excuse. In such case, he is, in a certain sense, an independent promisor, and must perform his promise.

In *Maggs* v. *Ames*, 4 Bing. 470, the defendant had guaranteed the purchases made by a married woman incapable of making a contract; the question in the case was whether this guaranty should have been in writing; but it is assumed throughout, by court and counsel, that, if it had been in writing, the defendant would have been liable, although there could have been no liability on the part of the principal.

In a similar manner, where one becomes a surety for the performance of a promise made by a person incompetent to

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contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defence on the part of the principal against which the surety assures the promisee. *Yale* v. *Wheelock*, 109 Mass. 502.

The bond in the case at bar is several, as well as joint. It appears from it that Mrs. Winn is the wife of the obligee, and it recites the agreement made between them. This agreement made by her is void, so far as the case now discloses, solely because of her incapacity to contract; but this should not release the defendant from his engagement that she should perform the promise made by her. The defence which Mrs. Winn personally has, resulting from her situation, should not be open to him.

Nor do we perceive that any distinction can be made, as suggested by the defendant, between the promise of a married woman, which is void, and that of a minor, which is voidable. In either case, the surety assures the promisee against the incapacity of the principal to make a legal contract, whether it be more or less complete.

The cases in which it has been held that the coverture of the principal promisor at the time of making her promise will not discharge the surety, when such coverture was known to him, are numerous, and have arisen on many descriptions of contract. *Smyley* v. *Head*, 2 Rich. (S. Car.) 590. *Kimball* v. *Newell*, 7 Hill, 116. *Nabb* v. *Koontz*, 17 Md. 283. *Jones* v. *Crosthwaite*, 17 Iowa, 393. *Weed Sewing Machine Co.* v. *Maxwell*, 63 Mo. 486. *St. Albans Bank* v. *Dillon*, 30 Vt. 122. *Davis* v. *Statts*, 43 Ind. 103. *Stillwell* v. *Bertrand*, 22 Ark. 375.

Exceptions sustained.

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COMMONWEALTH *vs.* GEORGE HILL.

Bristol. Oct. 25. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent

At the trial of a criminal case, whether the defendant's counsel shall be allowed to read to the jury provisions of the statutes other than those relating to the offence charged, instead of stating them orally, is within the discretion of the presiding judge, to the exercise of which no exception lies.

If a husband takes no part in keeping a tenement owned by his wife, and used by her as a house of ill-fame, for illegal gaming, or for the illegal sale and illegal keeping of intoxicating liquors, he cannot be convicted of so keeping it, if his wife's acts are done without his consent and against his will; and whether he used all practicable means to prevent her from so keeping the tenement is relevant only on the question of his consent or want of consent.

At the trial of an indictment for keeping and maintaining a tenement used as a house of ill-fame, for illegal gaming, and for the illegal sale and illegal keeping of intoxicating liquors, it appeared that the premises in question were owned and conducted by the defendant's wife; and that he lived there with her, and was present during, and knew of, her illegal acts. The defendant offered evidence to show that, "from time to time during five years prior to the finding of the indictment, he had ordered, directed, persuaded, and used all reasonable and practicable means in his power to prevent his wife from doing any of the acts charged, and that his wife told him the property was hers and she would do as she pleased." The judge excluded any evidence on this point relating to any period prior to the first date named in the indictment. *Held*, that the defendant had good ground of exception.

INDICTMENT for keeping and maintaining a common nuisance, to wit, a certain tenement in New Bedford, used as a house of ill-fame, for illegal gaming, and for the illegal sale and illegal keeping of intoxicating liquors, on January 1, 1886, and on divers other days and times between that day and the day of finding the indictment, June 10, 1886.

Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The government's evidence tended to show that said tenement, which was a house, was used for the illegal sale of liquor, and was resorted to for prostitution and lewdness during the period covered by the indictment; that the business was transacted with the witnesses by the defendant's wife, in whom was the title to said house, which was paid for by moneys of the defendant; but that the defendant lived with her, and was present and had knowledge thereof. It also appeared that the wife furnished

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the food for the table; that the family consisted of themselves and three children; and that the defendant had done no business of his own for two years, but had money of his own to the amount of several hundred dollars, acquired in a business which he had formerly carried on.

The counsel for the defendant, in opening for the defence, stated to the jury that the defendant proposed to show that the dwelling-house and land where the business was carried on was the separate property of the wife, she being the owner thereof in fee since 1876; and that the defendant had ordered, directed, persuaded, and used all other reasonable and practicable means to prevent his wife from committing any of the offences charged in the indictment.

He then proceeded to read to the jury the first two sections of the Pub. Sts. *c.* 147, relating to the rights of married women in the management and control of their separate property, but was interrupted by the presiding judge, and directed not to read said statutes to the jury. Thereupon the counsel desisted from reading said statutes, but claimed the right to read them to the jury, and to have an exception to the refusal of the judge to allow him to do so. The judge thereupon ruled that the matter of reading said statutes to the jury was within the discretion of the court, and not a matter of exception.

It appeared in evidence for the defence, that the title in fee to the place was in the wife, as before stated, and that the parties had lived there as husband and wife ever since the purchase. The defendant offered evidence to show that, from time to time during five years prior to the finding of the indictment, he had ordered, directed, persuaded, and used all reasonable and practicable means in his power to prevent his wife from doing any of the acts charged, and that his wife told him the property was hers and she would do as she pleased. The judge excluded any evidence on this point at any time prior to January 1. The defendant then gave evidence tending to show those facts covering the time from January 1 to June, 1886.

At the close of the evidence, the defendant requested the judge to instruct the jury as follows: "1. A married woman who owns real estate in fee has as full control of the same during her life as she would have if single. She has a right to lease it for a

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term of years, or to convey it by deed, which will be good and effectual as against her husband during her lifetime. She has a right to occupy it alone and expel her husband therefrom if it suits her pleasure or convenience, even though she occupies it as her dwelling-place. 2. Her husband has no legal right to expel her therefrom, and any force used by him for that purpose would be a criminal assault. 3. He has no right in disciplining his household to beat or strike her. 4. If, under the circumstances disclosed by the evidence, the jury are satisfied that he did not in fact permit and suffer such use as is charged in the indictment, he cannot be convicted."

The judge refused to give any instructions on the first two points, ruling that they were immaterial; gave the third; and further instructed the jury as follows:

"If a house owned by a married woman, while used by her and her husband and their family as their domicil, is kept and used by her as a house of ill-fame, or is kept and used by her for any of the purposes alleged in this indictment, her husband would be responsible for such use, if it was with his knowledge and consent, or with his participation, or if he permitted and suffered that use; but he would not be responsible for that use if it was without his knowledge or consent, or against his wishes, and in spite of every reasonable, lawful, and practicable effort on his part, exercised in good faith, to prevent such use."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Brown, for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

FIELD, J. In offences like that charged in this indictment, there is a presumption of law that acts done by the wife in the immediate presence of her husband are done by her under coercion from him. This was originally a presumption in favor of the wife, but it is now also considered that there is a presumption against the husband that acts done by the wife in his immediate presence are done by his command or authority. In each case, it is a disputable presumption, and may be rebutted or contradicted by evidence, and this presumption has perhaps lost something of its force in modern times in consequence of

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the rights given to married women by statute, and the diminished power of control which by law and usage husbands now have over the person and property of their wives. Still, it has recently been distinctly declared that a husband has the rightful power to prevent his wife from using, for the illegal sale of intoxicating liquors, a house owned by her as her separate property, and occupied by both as the home of the family. This must be equally true when the wife uses the house as a resort for prostitution. *Commonwealth* v. *Carroll*, 124 Mass. 30.

If the husband took no part in keeping the tenement for the purposes charged in the indictment, we think that the question of fact was whether he consented to his wife's keeping it for these purposes. If she kept it of her own free will, and without his consent and against his will, he could not be convicted. Whether he used all reasonable and practicable means to prevent her from keeping the tenement for these illegal purposes was relevant only upon the question of his consent or want of consent; and if in fact she acted of her own free will, and without his consent and against his will, he could not be convicted, although he had not used all reasonable and practicable means to control her conduct.

We are aware that, in some of the decisions, expressions have been used which indicate that it is a substantive part of the law, that, to excuse himself, the husband must show that he has used all reasonable and practicable means to restrain his wife; but, taking all the decisions together, we think it appears that his whole conduct, including what he did and said, and as well what he could reasonably have done and did not do, is admitted as evidence only for the purpose of proving or disproving his consent in fact to the acts done by his wife. *Commonwealth* v. *Putnam*, 4 Gray, 16. *Commonwealth* v. *Wood*, 97 Mass. 225. *Commonwealth* v. *Welch*, 97 Mass. 593. *Commonwealth* v. *Tryon*, 99 Mass. 442. *Commonwealth* v. *Cheney*, 114 Mass. 281. *Commonwealth* v. *Barry*, 115 Mass. 146. *Commonwealth* v. *Kennedy*, 119 Mass. 211. *Commonwealth* v. *Carroll*, *ubi supra*. *Commonwealth* v. *Pratt*, 126 Mass. 462.

If, then, the tenement was the separate property of the wife, this fact and the rights generally which belonged to the wife as owner of the tenement, and the knowledge or belief of the

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husband, and the claim of the wife in reference to these rights, so far as there was evidence that the conduct of the husband might have been influenced thereby, were competent evidence for the jury upon the question of his consent.

The defendant's counsel had the right to argue to the jury all questions of law and fact involved in the case, subject to the ultimate decision of the presiding justice upon all questions of law. *Commonwealth* v. *Porter*, 10 Met. 263. Those provisions of the statutes which directly relate to the offence charged, counsel have always been permitted to read to the jury. Whether counsel should be permitted to read other provisions of the statutes to the jury, we think, was in the discretion of the presiding justice. The whole law which defined the nature and extent of the right which the husband had to control the conduct of his wife was not contained in the statutes, and the general rule is that it is within the discretion of the presiding justice whether counsel shall read to the jury statutory or common law from books, or shall state it orally, subject to the correction of the court. *Commonwealth* v. *Austin*, 7 Gray, 51.

The first two instructions requested apparently involved some questions of law which were not raised by the evidence, and upon which the presiding justice was not required to rule; and the instructions given were correct, unless the last clause be considered as substantially modifying the instructions that the defendant would be responsible if the use of the house by his wife was with his knowledge and consent, and would not be responsible if her use of it was without his knowledge or consent. We are not convinced that this clause was intended to modify the substance of the instruction previously given.

The time covered by the indictment was from and including January 1, 1886, to the day of finding the indictment, which was June 10, 1886. It appears that "the defendant offered evidence to show that, from time to time during five years prior to the finding of the indictment, he had ordered, directed, persuaded, and used all reasonable and practicable means in his power to prevent his wife from doing any of the acts charged, and that his wife told him the property was hers, and she would do as she pleased. The judge excluded any evidence on this point at any time prior to January 1."

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The defendant was necessarily somewhat restricted in his defence, as he could not be permitted to testify to private conversations with his wife. The offence charged was a continuing one, and it might well be that he could produce but slight evidence that, during the time covered by the indictment, he had endeavored to prevent his wife from using the tenement for the illegal purposes charged; and yet he might have had ample proof that, within a reasonable time before this, he had in vain done, in good faith, all that he reasonably could to prevent her from using it as she did; and from this evidence the jury might have found that he continued to be of the same state of mind during the time covered by the indictment as before, and that his wife knew this, and continued to keep the premises in the same illegal manner, against his will.

When the question is of the state of mind of a person at or during a particular time, which can only be shown by acts or speech, evidence of what he said or did for a reasonable time before, if it tends to show a permanent or settled state of mind on the subject, has always been admitted. How far back a party shall be permitted to go, is largely in the discretion of the presiding justice; the only general rule is, that the evidence should be admitted, if, under all the facts proved, there can be a reasonable inference that the same state of mind continued to exist up to and during the particular time which is the subject of inquiry. Similar considerations apply to the knowledge or belief of the wife in regard to her husband's assent to or dissent from her course of conduct.

We think that the presiding justice erred in limiting the defendant to the time covered by the indictment; and, for this reason, the exceptions are sustained. *Potter* v. *Baldwin*, 133 Mass. 427. *Exceptions sustained.*

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JOHN O'CONNELL *vs.* PATRICK O'LEARY.

Bristol. Oct. 25. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

An action on the Pub. Sts. *c.* 100, § 24, for sales of intoxicating liquor to the plaintiff's minor children, is an action for a penalty or forfeiture, within *c.* 197, § 4, and, if brought more than one year after such sales, is barred by the latter statute.

The delivery of intoxicating liquor to a minor, in pursuance of a sale to his mother, and for her use, is not a sale to the minor, within the Pub. Sts. *c.* 100, § 24.

HOLMES, J. This is an action under the Pub. Sts. *c.* 100, § 24, to recover for alleged sales of liquor to the plaintiff's minor son and daughter. The section is as follows: "Whoever, by himself or his agent or servant, sells or gives intoxicating liquor to a minor, ... shall forfeit one hundred dollars for each offence, to be recovered by the parent or guardian of such minor in an action of tort." It was admitted that the sales took place more than a year before action brought. The court ruled that the action was not barred by the Pub. Sts. *c.* 197, § 4, limiting to one year actions for penalties or forfeitures under penal statutes, if brought by a person to whom the penalty or forfeiture is given. The defendant excepted.

The plaintiff's evidence showed that the children were only messengers of their mother; that they delivered the whiskey to her, drinking none of it themselves; and that sometimes the mother sent the money to pay for it, and sometimes the whiskey was charged, it did not appear to whom. The court ruled that the sales were such sales to a minor as would entitle the plaintiff to recover under the statute, if the evidence was believed. To this ruling also the defendant excepted.

We are of opinion that both exceptions must be sustained. The statute reads, "shall forfeit . . . . for each offence." These words are technical, and are to be construed according to their peculiar and appropriate meaning in the law. Pub. Sts. *c.* 3, § 3, *cl.* 3. On their face they import forfeiture, that is, punishment, for an offence, not indemnity for a private wrong. The main purpose is manifestly to deter. Who shall have the money when

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recovered depends on construction; and, if the statute means indemnity, it leaves the question doubtful whose supposed wrong is to be made good. Sufficient provisions for private injury would seem to be made by §§ 21, 25, of the same chapter, where it is left to the jury, either wholly or within limits, to make the damages proportional to the harm. It is not readily to be supposed that the Legislature would undertake to declare an unchangeable sum the proper indemnity in all cases, even if for extraordinary reasons it might do so by language which could bear no other meaning. *Norris* v. *Crocker*, 13 How. 429, 440. The sum is to be recovered by the parent or guardian in an action of tort. But it is admitted by the plaintiff that an action for a penalty may be limited to certain persons. Indeed, the statute of limitations seems to contemplate that case. Pub. Sts. *c.* 197, § 4. See *Atlas Bank* v. *Nahant Bank*, 3 Met. 581, 583; *Cumberland & Oxford Canal* v. *Hitchings*, 57 Maine, 146. And the Legislature may as well make the sum recoverable in one form of action as in another. Pub. Sts. *c.* 217, § 2. *Wilson* v. *McLaughlin*, 107 Mass. 587. *Commonwealth* v. *Connecticut River Railroad*, 15 Gray, 447. *Smith* v. *Look*, 108 Mass. 139, 141.

Two cases cited for the plaintiff require notice. *Roberge* v. *Burnham*, 124 Mass. 277, decided that, in actions like the present, the jury need not be instructed that they must be satisfied beyond a reasonable doubt. The attempt to measure the degree of certainty necessary to a verdict, like the attempt to fix the quantity of evidence, although familiar to the civilians, is not consonant to the general practice of our law, and may well be confined to the limits set by precedent. There is no reason for making such an attempt in an action for money, which is so far remedial that it is given by or on behalf of a person aggrieved, even though the sum sued for is a penalty. A penal statute imposing a forfeiture may be remedial in a certain sense. See *Commonwealth* v. *Fahey*, 5 Cush. 408, 411. In *Day* v. *Frank*, 127 Mass. 497, it was held that the bond of a licensee, under the St. of 1875, *c.* 99, § 9, (Pub. Sts. *c.* 100, § 18,) conditioned to pay all damages recovered under the act, applied to sums recovered under a section (§ 15) like the one now sued upon. The section (§ 9) fixed the form of the bond, and at the same time interpreted it, by providing that it should be for all costs, damages, and fines

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incurred by violation of the provisions of the act. Clearly the bond was intended to cover forfeitures to a person aggrieved, even if they are not described accurately in the opinion as liquidated damages.

We are of opinion that this is an action for a penalty or forfeiture, within the Pub. Sts. *c.* 197, § 4, and that it is barred by that section; and we do not regard the cases mentioned as inconsistent with our decision.

We are also of opinion that the second ruling which we have mentioned was wrong. If there had been any suggestion that the sales purported to be sales to the children as principals, or as agents of undisclosed principals, there might have been a question for the jury. But, on the evidence, it could not have been assumed, against the defendant, that they did purport to be such sales, and evidently the ruling proceeded, as did the argument for the plaintiff before us, on the opposite assumption, that it was known to the defendant that the children were buying for their mother. In *Commonwealth* v. *Lattinville*, 120 Mass. 385, it was held that a sale to a minor for his parents' use was not within the St. of 1875, *c.* 99, § 6, *cl.* 4; and § 15, which is the same as the § 24 now sued upon, was referred to as showing clearly that what the statute meant to prevent was "the possession of intoxicating liquor by a minor for his own use, and subject to his own control." In *St. Goddard* v. *Burnham*, 124 Mass. 578, it was held that § 15 of the St. of 1875 did not apply to a delivery to a minor of whiskey ordered and paid for by a third person. *A fortiori* it did not apply to a delivery to an errand-boy.

After these decisions, the former section was amended by the St. of 1880, *c.* 239, § 3, (Pub. Sts. *c.* 100, § 9, *cl.* 4,) so that licenses are now conditioned against sales to minors, either for their own use or that of any other person, and the penalties affixed to violations of the provisions of the license would be incurred by sales like the present. *Commonwealth* v. *O'Leary*, 143 Mass. 95. But § 15 of the St. of 1875 was left untouched, as it was, and as it still stands in the Public Statutes. If, before the amendment of the other section, the plain purpose and scope of § 15 was to prevent sales to minors for their own use, that is still its purpose. The words still mean what they meant when

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they were first enacted; and, if any inference is to be drawn from the subsequent action of the Legislature, it is that they were contented with the construction given to this section by the court.

Assuming that the amendment does not affect the construction of this section, it cannot be argued seriously, that, because a sale made or attempted to be made to a parent through the agency of a minor child is illegal, it therefore becomes a sale to the minor, (*Rodliff* v. *Dallinger*, 141 Mass. 1,) even if it were true that the illegality would prevent the title passing where there is a delivery, and the sale is fully executed. *Myers* v. *Meinrath*, 101 Mass. 366. *Exceptions sustained.*

J. Brown, for the defendant.

E. Avery & T. F. Desmond, for the plaintiff.

JOHN T. DONNELLY *vs.* HOMER M. DAGGETT, JR.

Bristol. Oct. 25. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

In an action for malicious prosecution it appeared that the plaintiff had been arrested, on a complaint made by the defendant, for fraudulently concealing mortgaged property. At the trial, material facts were in dispute, and it did not appear that a full and correct statement of the facts as known to the defendant were made to his counsel. There was also evidence that the defendant believed, before making the complaint, that the property had been wrongfully removed by a third person. *Held*, that the defendant had no ground of exception to a refusal of the judge who presided at the trial to rule that whether or not there was probable cause was a question of law for the court, nor to his refusal to rule that there was no evidence of want of probable cause.

TORT, in two counts, for malicious prosecution.

The first count alleged that the defendant, at a term of the First District Court of Bristol, on December 2, 1885, falsely and maliciously, and without any reasonable or probable cause, procured the plaintiff to be complained against, for fraudulently removing and concealing certain personal property, on or about July 1, 1885, while a mortgage to the defendant was in force upon the same and unpaid.

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The second count alleged that at the same term the defendant falsely and maliciously, and without any reasonable or probable cause, procured the plaintiff to be complained against, for conveying, on January 7, 1885, by mortgage to the defendant, certain personal property, he, the plaintiff, not being the owner of said personal property, but having hired or leased the same without the written consent of the owner or lessor, and without informing the defendant that it was so hired or leased.

Trial in the Superior Court, before *Barker*, J., who allowed a bill of exceptions, in substance as follows:

It appeared that on December 23, 1885, the said complaints were tried in the First District Court of Bristol at Attleborough; that, after a hearing, the court ordered the plaintiff to recognize in the sum of $300, on each of said complaints, for his appearance before the grand jury; that the grand jury found "no bills;" and that the plaintiff was discharged.

It was in evidence, and not contradicted, that the plaintiff by two mortgages, the first dated January 7, 1884, given for two months, and the second March 7, 1884, for one month, mortgaged to the defendant one New England organ, a rifle, a violin, and certain household furniture, all in North Attleborough, as security for two loans of $150 and of $80, which loans were at the time of making said complaints unpaid; that about the middle of July, 1885, while the plaintiff was in South Framingham, the furniture was taken away from his house; that the plaintiff told the defendant, before the complaints were made, that he understood the mortgaged furniture had been taken by the Providence Furniture Company.

The plaintiff testified that a portion of his furniture was bought of the Providence Furniture Company on a conditional sale, but denied that the mortgages included any of such portion.

It was in evidence, and uncontradicted, that the New England organ, the rifle, and the violin had disappeared before the making of said complaints, and that the defendant did not know where they were and was unable to find them; that the plaintiff knew where the rifle and the violin were; that the defendant demanded their return repeatedly before the complaints were made, but the plaintiff neglected to deliver them up or inform the defendant of their whereabouts until long after the criminal

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complaints were made; but the plaintiff testified that he told the defendant that he had lent the rifle and the violin.

The plaintiff testified, that on July 20, 1885, he came home from South Framingham, went to his house, and found that everything had been taken from it, in his absence and without his knowledge or authority, and that he went at once to the defendant's office and told one Parker, the defendant's agent and servant, about it; that he next saw the defendant personally on August 15, 1885, when the defendant told him that he understood the goods were taken away, and the plaintiff told him it was so, and thereupon the defendant asked him to assign his claim against the Providence Furniture Company for taking away the goods to the defendant in settlement, so that he could sue the company in his own name; that he did not give him such an assignment, but did then give him another assignment of his wages, to be operative after an assignment to one Herrick, and that the defendant told him he was willing to wait until after Herrick got through; that he next had a conversation with the defendant in Thanksgiving week, 1885, when he offered him his services as a jeweller to work out the bill, the defendant being then in the jewelry business; that the defendant said he would not have him in the shop anyway, and that, if he did not go to his mother or try to raise the money, he would "jail" him; that he next saw the defendant two days before his arrest, when the defendant drew up a mortgage which he told him to get his mother and brother to sign, and that it was either that or jail; that on the day of the arrest the defendant asked him what he was going to do, and said he must furnish the money or go to jail; and that he did not furnish the money, and was arrested.

J. E. Pond, called by the defendant, testified that he was an attorney at law, and had practised law about fourteen years in Attleborough; that the defendant came to him as an attorney at law, with the two mortgages before mentioned, and told him he wanted him to collect those mortgages either by foreclosure and sale under the power contained in each, or by getting them from the party himself; that Pond gave the mortgages to deputy sheriff James W. Riley of North Attleborough to hunt up the property; that, from the report made by Riley, Pond told the defendant that the only course he could see was for him to bring a

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criminal prosecution, in the manner and form in which the above mentioned complaints were made; and that he did not obtain any of the facts on which he based that advice from the defendant, except the fact that the mortgages were given; and that all that the defendant said to him with regard to the subject was the fact that those mortgages were given.

The defendant, to the question whether or not he had any facts within his knowledge with relation to this matter which were not stated to Pond, answered, "No, sir. In fact I got the most of my knowledge about this from Mr. Pond, from his report." To the question, "Were there any facts which you knew about this matter which were not brought out in your conversations with Mr. Pond, your attorney?" the defendant answered, "No, sir." To the question whether he told Pond the facts in this case, the defendant answered, "I told him he owed me these mortgages; I wished he would collect them." And to the question whether that was the only fact he laid before Mr. Pond, the defendant testified, "Perhaps I said to him I had heard the furniture had been taken away."

James W. Riley, called by the defendant, testified as follows: "Daggett and Pond called on me to look up some furniture that was mortgaged. I went to look after it, and saw Donnelly; he told me about this property that was mortgaged to Daggett, that Flint of Providence had come and taken it on a lease and carried it away. In a few days afterwards I had a warrant placed in my hands for his arrest. He was out of the State and I went to see his brother, and left word there for the plaintiff to come to my house. He came on Sunday night. I showed him the warrant, and told him what it was for. He said they came and took that property and carried it off. It was leased property. He supposed he could get the money for Daggett. When he mortgaged the property there, he expected to pay for it, but business had been dull, and he could not pay for it."

The plaintiff, in answer to the question whether he told Riley that the property that was mortgaged was the property of the Providence Furniture Company, testified as follows: "I did not have anything to say about the furniture. I was talking about the settlement with Daggett. That was all the conversation we had."

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There was no other evidence in the case material to the question of probable cause.

At the close of the evidence, and before the arguments, the defendant requested the judge to rule, that the question whether or not there was probable cause on the facts proven was a question of law for the court, and to rule, as matter of law, that the evidence did not show want of probable cause.

The judge refused so to rule, but submitted to the jury the question whether, on the evidence, there was probable cause. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. H. Fox, (*F. I. Babcock* with him,) for the defendant.

A. E. Bragg, for the plaintiff.

FIELD, J. Whether there is probable cause for a prosecution is a question of law only when all the facts which are relevant are either agreed or are undisputed. *Sartwell* v. *Parker*, 141 Mass. 405. It is also a question of law whether there is sufficient evidence of a want of probable cause to sustain the burden of proof, which is on the plaintiff. If a person fully lays before counsel learned in the law all the facts which he knows, and all the facts which he believes to be true and can be established by evidence, and he is advised by counsel that they constitute a legal cause for a prosecution, and he in good faith accepts this advice and follows it, he is not liable to an action for malicious prosecution. *Olmstead* v. *Partridge*, 16 Gray, 381.

In the case at bar, material facts were in dispute, and it does not appear that a full and correct statement of the facts as known to the defendant was laid before counsel. There was some evidence that the defendant believed that the Providence Furniture Company had wrongfully taken away the goods, because there was evidence that the defendant asked the plaintiff for an assignment of his cause of action against that company; and although this evidence was more directly pertinent to the question of malice, we cannot say that it had no tendency to show a want of probable cause. *Mitchell* v. *Wall*, 111 Mass. 492. *Bobsin* v. *Kingsbury*, 138 Mass. 538. *Krulevitz* v. *Eastern Railroad*, 140 Mass. 573. *Moyle* v. *Drake*, 141 Mass. 238.

Exceptions overruled.

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COMMONWEALTH *vs.* HOLDER M. BROWNELL.

Dukes County. Oct. 26. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

At the trial of a criminal case, the defendant's counsel, in his closing argument to the jury, used this language: "If you acquit the defendant of this charge, how will you answer the question of your neighbors and friends as to why you did it? You will answer it as your own consciences must feel here. It was not proven. The government failed to convict him." The counsel was interrupted by the judge, who refused to allow him to pursue that line of argument, on the ground that it was improper. *Held*, that the defendant had good ground of exception.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, evidence of a conversation between a witness for the government, who has testified that he was active in the prosecution, and the complainant, who is not a witness, in relation to the matter, is properly excluded.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, it appeared that the tenement was a hotel, with a bar-room in the basement; that the bar-room could be entered by passing through the office of the hotel and going down stairs, and also by entering a door in the basement. Two officers, who testified that they made a seizure of liquors in the bar-room, stated that, when they passed through the office, they saw the defendant there. The sheriff of the county testified that he had seen the defendant about the office, looking at the books, writing, and giving directions. Another witness testified that he had seen the defendant about the office, giving directions, and had seen him direct a servant to take a card to a guest's room. The defendant did not testify as a witness. The judge, after instructing the jury as to the defendant's right not to testify, instructed them as follows: "If you find, upon the question of the proprietorship of that hotel, he had it in his power to produce witnesses here not known to the government, who could give you further light upon that question, and he does not choose to do it, you may take that fact into consideration when you come to consider whether there is any reasonable theory consistent with his non-proprietorship of that hotel and with the evidence. I do not mean to say that his failure to produce the witnesses here will fill up any gap, if you find any, in the evidence of the Commonwealth, but only that when you are to consider the reasonableness of any explanation of his acts here, if any have been proved, with regard to that hotel, consistent with his not being the proprietor of it, you may take into consideration the fact whether or not there is other evidence in his power upon that question which he could place before you." *Held*, that the defendant had no ground of exception.

COMPLAINT for keeping and maintaining a common nuisance, to wit, a certain tenement in Cottage City, used for the illegal sale and illegal keeping of intoxicating liquors, on July 8, 1887,

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and on divers other days and times between that day and August 9, 1887. Trial in the Superior Court, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows:

It appeared that the Sea View House, the tenement alleged in the complaint, was a public hotel in Cottage City. The usual passageway for guests led from the sidewalk in front of the building on to a piazza, and from there into a room where the office was, with reception-rooms on each side, and with an elevator, a coat-room, and a dining-room beyond. There was also a passageway on the side, where persons could pass from the office down stairs to the basement, where there was a barber's shop, a stand for the sale of newspapers and periodicals; also a billiard-room, with a bar-room about twenty feet by ten, partitioned therefrom, in one corner, which was entered by a door from the billiard-room. The billiard-room could be entered by a door from the outside, also by passing through the barber's shop from the outside, and also through a passageway from outside around the barber's shop. To get to the bar-room, it was necessary to pass through the billiard-room.

Two officers testified that, on July 12, 1887, they entered the hotel at the office and passed therefrom down the side passageway, through the billiard-room, into the bar-room, where they found a man in attendance whom they did not know; that they, with a search-warrant, seized a number of bottles of intoxicating liquor from behind and about the bar; and that, when they passed through the office-room, they saw the defendant moving about there.

Three persons testified to purchasing liquor at the bar on three different occasions; that at one time they passed through the barber's shop to the billiard-room, and at another time from the office down the side passageway mentioned. Two of them were paid detectives, and one was Hugh Montgomery, a clergyman, who said he purchased it to get evidence of selling liquor against the defendant. None of these witnesses testified to seeing or knowing the defendant at any time, and they did not know the person behind the bar who sold it to them.

Jason L. Dexter, the sheriff of the county, testified that he had seen the defendant about the office, looking at the books, writing, and giving directions; that he had also seen a man named Pease,

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and also one named Weeks, doing the same thing during the period.

A. J. Church, a minister, testified that he had seen the defendant about the office of the hotel giving directions during the period; that on one occasion he had called for a guest who was stopping there; and that the defendant took his card and directed a servant to carry it to the guest's room, and the witness went up there.

No person testified to seeing the defendant in the basement at any time; and he offered no evidence in defence, except as to the reputation for truth of some of the witnesses for the government.

The witness Church testified that he had been active in the prosecution. He was inquired of whether he had had any conversation with Hatfield, the complainant, about the matter. He replied that he had. The defendant's counsel asked him what that conversation was. This was objected to; and the judge excluded it, on the ground that Hatfield was not a witness, and that statements by him were not material. It was not contended by the defendant that the conversation was offered to show that Church had made any statements contradicting or modifying his testimony as given. The defendant excepted to its exclusion.

During the closing argument, the counsel for the defendant relied mainly upon the point that there was no proof that the defendant exercised any control over the bar-room. He said in substance: "But, gentlemen, if you acquit Mr. Brownell of this charge, how will you answer the question of your neighbors and friends as to why you did it? You will answer it as your own consciences must feel here. It was not proven. The government failed to convict him." Here the judge interposed, and said that such a line of argument was not proper. The counsel replied that he regarded it as a legitimate and proper line of argument, and requested the judge to have his directions put in writing. This was done, as follows: "In so far as counsel for the defendant desires to instruct the jury what reasons they may hereafter give to anybody who chooses to talk with them about their verdict, for giving their verdict, the counsel for the defendant is stopped by the court." To this the defendant excepted.

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In his charge to the jury, relative to the fact that the defendant did not testify as a witness, the judge, after charging the jury fully and accurately as to the defendant's rights under the statute when not a witness, used the following language: "He is under the protection of the constitutional right to sit there, and you are not to say to yourselves that, if this thing is not so, he could explain it; but you are to take it as if he were mentally and physically unable to testify. But, gentlemen, this principle does not apply to witnesses other than the defendant, whom he can produce here; and if you find, for instance, upon the question of the proprietorship of that hotel, that he had it in his power to produce witnesses here not known to the government, who could give you further light upon that question, and he does not choose to do it, you may take that fact into consideration when you come to consider whether there is any reasonable theory consistent with his non-proprietorship of that hotel and with the evidence. I do not mean to say that his failure to produce the witnesses here will fill up any gap, if you find any, in the evidence of the Commonwealth, but only that when you are to consider the reasonableness of any explanation of his acts here, if any have been proved, with regard to that hotel, consistent with his not being the proprietor of it, you may take into consideration the fact whether or not there is other evidence in his power upon that question which he could place before you."

The counsel for the defendant, at the close of the charge, said to the judge, that, before taking exceptions, he wished to call attention to the fact that the real proprietor, or person in charge, could not be compelled to testify. The judge replied: "I think that is a fair criticism; and I will modify that to say, gentlemen of the jury, that what I have just said about witnesses whom the defendant could produce does not apply to any person who was the actual proprietor, or in charge. The defendant cannot be presumed or expected to produce here, to make testify, the actual proprietor himself." To the foregoing instructions the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Brown, for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

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W. ALLEN, J. It was proper for the counsel for the defendant to impress upon the jury their duty to acquit the defendant if his guilt was not proved by the evidence in the case, and to remind them that, whenever they should have a proper occasion to give a reason for acquitting the defendant, it would be sufficient to say that his guilt was not proved. The counsel had a right to present this thought in a logical or in a rhetorical form; he was at liberty to dramatize it in imaginary dialogue, and to illustrate and enforce it by imaginary occasions. The counsel in his argument suggested an occasion on which the jury might be asked the reason why they acquitted the defendant, and the answer which they would give. The language put into the mouth of the jurors is entirely proper and unobjectionable; the impropriety, if any, must have been in the supposed occasion of uttering it. The supposed occasion was the inquiry by friends and neighbors of the jury why they acquitted the defendant, and the supposed impropriety must have consisted, either in the implied suggestion that the jury might have in mind the opinions of their friends and neighbors, or in the suggestion that the jury might at some future time state to their friends and neighbors the grounds of their verdict.

Any attempt to influence a verdict by outside opinion and sentiment is improper, but an appeal to the jury not to be influenced by such opinions and sentiments is proper; and such appeal involves a recognition of the fact that the thought of such opinions may be in the mind of the jury. It is not an assertion of a fact, but the recognition of a possibility. There was no other suggestion of outside influences in the case at bar than was involved in warning the jury against them.

We see no impropriety in the other suggestion involved, — that, if the defendant was acquitted for want of proof, the jury were at liberty to say, in answer to questions of their friends and neighbors, that the proof was not sufficient. No question of disclosing the secrets of the jury-room, or of calling a juror to account for his verdict, is involved. The suggestion is, that the juror may voluntarily and on his own account make a statement of the true grounds on which he rendered his verdict. It was made to influence the jury to render their verdict upon the evidence, without regard to the opinions of others. Whether the

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exigencies of the defence called for such an appeal, and in what form it can be most effectively made, the court cannot know; that must be left to the discretion of counsel, within the limits of decorum and propriety. If a juror and his neighbor have, in common, information not in evidence, which satisfies them that the defendant is guilty, or if the jury know that the defendant is held to be guilty in common repute among their neighbors, it is still their duty to acquit him if the evidence does not prove him guilty. In such a case, the jurors could not but have in mind that outside knowledge and opinion, and it might be difficult for them to resist the influence of it, and to render a verdict solely upon the evidence. The reflection that they were not obliged to be forever silent, but could at some time explain that their verdict was rendered on the evidence before them, and not upon outside facts and opinions, might aid them in arriving at a true verdict, and would be proper for them to make; and we think that it is a consideration which counsel have a right to present to them. It was not for the defendant to show that the argument was particularly pertinent or applicable to his case. That is not matter of inquiry. It is not addressed to a known, but to a possible influence. The liability of the influence to exist, not its actual existence, makes the appeal proper.

As the defendant had a right to make the argument in the form in which his counsel put it, and as the considerations he desired to present were proper to be presented to the jury, the defendant was aggrieved by not being allowed to pursue his argument, and by the practical ruling of the court that the consideration was not proper to be regarded by the jury.

We do not find any other error in the rulings of the court.

Exceptions sustained.

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HENRY J. LANGLEY *vs.* CHARLES DAURAY & another, executors.

Bristol. Oct. 26. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

An action against an executor, for breach of an agreement to purchase land, made by his testator, cannot be maintained, if there were defects in the plaintiff's title of such a kind that he was never in condition to perform his part of the contract, and the testator did not repudiate the contract, but the plaintiff granted delay at his request, and the term of such delay had not expired at his death, and no offer to carry out the contract was made to the defendant, and no demand made upon him before bringing the action.

HOLMES, J. This is an action for breach of an agreement to purchase land, made by the defendants' testator. It is conceded that there were defects in the plaintiff's title of such a kind that he was never in condition to perform his part of the contract; but it is contended that the testator repudiated the contract altogether, and thus exonerated the plaintiff from attempting to perfect his title, and waived all defects. We think it unnecessary to examine the details of the case, or to consider whether it falls within the principle of *Curtis* v. *Aspinwall*, 114 Mass. 187, 193, and that class of cases, because not only it does not appear that the testator repudiated the contract, but it appears affirmatively that the plaintiff granted delay at his request ("Langley yielded to Bedard's request for delay"); that the delay granted had not expired at the testator's death; and thus that the testator had never broken or refused to perform his covenant. See *Ballou* v. *Billings*, 136 Mass. 307, 308. No offer to carry out the contract was made to the defendants, and no demand was made upon them before bringing this suit. The ruling that the plaintiff was not entitled to recover was correct.

Judgment for the defendants.

J. M. Morton, for the plaintiff.

T. M. Stetson & H. A. Dubuque, (*E. Higginson* with them,) for the defendants.

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JOSIAH O. HINCKLEY *vs.* INHABITANTS OF SOMERSET.

Bristol. Oct. 26. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A person, who, while driving along a highway in a town, is injured by reason of his horse taking fright and running against and upon a stone wall two feet in height on the side of the way, may maintain an action against the town, if the injury was received because the wall was not high enough to prevent it, and the want of height rendered it insufficient as a barrier, and the horse was reasonably safe to drive, and the driver was in the exercise of due care and did not lose control of his horse, or lost control for a moment only, and either regained control or would have regained it before the horse ran against the wall, if it had been of sufficient height.

The fact that a stone wall, built by county commissioners on the side of a way in a town, is afterwards rebuilt by the highway surveyor of the town, and remains in the same condition as when rebuilt by him until the happening of an accident by reason of the insufficiency in height of the wall as a barrier, is notice to the town of the existence of the defect.

In an action against a town for personal injuries occasioned by a defect in a way, evidence of conversations between a person who has met with a similar accident at the same place and others not officers of the town, concerning his accident, is not competent to show notice to the town of the existence of the defect.

Exceptions taken at a trial will not be sustained because incompetent evidence has been admitted to prove a fact which the conceded facts necessarily establish, if this court is not satisfied that the excepting party has been prejudiced by the admission of such evidence.

TORT, for personal injuries occasioned to the plaintiff by a defect in a highway in the defendant town. Trial in the Superior Court, before *Barker*, J., who allowed a bill of exceptions, in substance as follows:

The notice, duly served on the defendant, stated "that, while travelling on the highway from Somerset to Dighton across the Broad Cove Bridge, so called, on the 29th of May, 1886, between 5 and 6 o'clock P. M., in consequence of the narrowness of the road and the insufficiency of the barrier, and for want of a suitable wall, railing, or fence, when within fifteen feet of the bridge on the Somerset side thereof, and on the easterly side of the highway, my horse and team got partly over the wall, and I was thrown out of my carriage and severely bruised and injured, and my horse and carriage were also hurt and injured."

It was proved, or admitted, that the road in question was laid out by the county commissioners, and that by statutory authority

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the commissioners laid out and constructed Broad Cove Bridge and the approaches thereto, and the walls, railings, and barriers. Broad Cove is an inlet of Taunton River, and is tide water. The work was partly in Somerset and partly in Dighton, the middle of the channel, which was the middle of the bridge, being the dividing line. The defendant town was charged with the care and maintenance of the southerly part, which was where the accident happened, and had ever since, down to and including the day of the accident, maintained and kept in repair so much of said road and bridge as were within its limits. There was no question made but that a barrier or wall was necessary to prevent travellers from going off and into the water, which was some ten feet deep, and the surface of which was from eight to ten feet below the level of the top of the wall, and on the east side of the bridge or causeway. The barriers were constructed of stone, and on the east side were from two feet to two feet and three inches in height and twenty inches thick, and solidly built, and at the place of the accident were two feet high. They had been, up to and including the day of the accident, kept and maintained in substantially the same condition as left by the commissioners when they were turned over to the town, except as hereinafter stated. The work was done in 1854. In 1885, the highway surveyor of the town had rebuilt and repaired the same, and raised the east wall some six inches in height.

On the west side of the bridge, and in Broad Cove, persons engaged in oyster fishing anchored their boats, and sometimes tied them to the wall on the west side of the bridge; and this had been done for several years prior to the time of the accident. About four hundred feet to the west of the bridge was a railroad, which crosses the highway to the south of the bridge and between that and the village of Somerset.

The plaintiff introduced evidence, that, on May 29, 1886, between five and six o'clock in the afternoon, he was travelling on said highway, on the Somerset side, and along the causeway leading to the bridge; that his horse was gentle, his rate of speed being then six miles an hour; that he held a taut rein on his horse; that his horse was frightened by the oyster boats on the west side of the bridge, and suddenly shied to the east

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side of the way, and ran into and upon the wall or barrier on the east side; that his horse got up, on to, and astride of the wall with his hind legs, while his fore feet rested inside, on the road; that the right forward wheel of his open buggy went on to the wall, and over to the east side, and the axle rested on the wall, and the left wheel was in the road on the inside, and the right hind wheel also went up on to the top of the wall; that he was thrown out, but still held the reins; that his horse and wagon came back into the road; and that it was all done and over in an instant. The accident occurred from fifteen to twenty feet from the bridge.

The plaintiff had travelled over the road more or less since April 1, 1885, to and from Somerset and Dighton, and knew of the oyster boats and of the walls of the bridge. The plaintiff contended that the wall was defective, because too low; and that the accident was due to that defect.

The defendant introduced evidence tending to show that the horse only reared up, and placed his fore feet on the top of the wall.

This was all the evidence in the case as to the place, the time, and the cause of the accident, and as to the laying out, construction, and repair of the bridge, road, causeway, and wall. The jury took a view of the premises.

For the purpose of proving that the town had notice of the defect, the plaintiff called one Dr. Shurtleff, and offered to show by him that he had met with an accident similar to that which befell the plaintiff, and at or near the same place; but, it appearing that the witness had had no talk with any of the town officers about the accident, he was at that stage of the case asked nothing by the plaintiff in regard to the accident. Subsequently, he was recalled by the plaintiff, and, upon the plaintiff's counsel stating that he expected to show that Dr. Shurtleff had spoken generally of the accident in the village of Somerset, where he lived, and where two of the three selectmen lived, and should contend that it was competent for the jury to find, if such should appear to be the fact, that the selectmen either knew, or by the exercise of reasonable care might have heard, of the accident, the judge ruled that it was competent for the plaintiff to put in evidence of the accident, as bearing on the

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question of notice to the authorities of the town, but that the evidence was not to be considered by the jury as tending to show that there was any defect, or that there had been any accident. The plaintiff thereupon put the following question: "Without asking you what the accident was, how generally did you speak of it around the village?" and he answered, "Very little indeed." The witness further stated, that he had spoken of it but very few times, and to but two or three persons; and the plaintiff put no further questions, and pursued the matter no further.

The defendant called as a witness one Edward Buffington, who testified that he was a deputy sheriff, living about a mile and a half from the village of Somerset, but that he was in the village nearly every day, and his business led him through all parts of the village, and brought him in contact with many different people, and he had never heard the accident to Dr. Shurtleff spoken of.

At the close of the evidence, the defendant asked the judge to rule that, on the evidence, the defendant was not liable, and to direct a verdict for the defendant. The judge refused so to do.

The defendant then asked for the following instructions to the jury: "1. If the injuries for which the plaintiff seeks to recover were due in whole or in part to the narrowness of the highway, the plaintiff cannot recover. Narrowness of the highway, duly located, is not a defect for which the defendant is liable. 2. If the plaintiff's horse was frightened by an object outside of the limits of the highway, and while so frightened and because of said fright ran into and upon the railing or wall, and the injuries were received of which the plaintiff complains, the plaintiff cannot recover. Such injuries would not be caused solely by a defect in the highway, or want of sufficient railing or barrier. 3. If the plaintiff's horse, wagon, or himself would not have come in contact with the railing or wall, nor the accident have occurred if the team had passed on in the course in which the plaintiff was driving, if the plaintiff's horse had not been frightened, the plaintiff cannot recover. 4. The fact that boats with sails were anchored in Broad Cove, and frightened the plaintiff's horse, would not render the town liable. Broad Cove on the evidence is tide water, over which the town has no control.

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5. If the highway and barriers where the plaintiff was injured were in good repair, and in substantially the same condition as constructed and left by the county commissioners when they located the highway and built the barriers or walls, the plaintiff cannot recover. 6. If the plaintiff's horse, by reason of fright, became uncontrollable, so that the plaintiff could not stop him, or direct his course, or exercise control over his movements, and in this condition came upon the barrier or wall which was defective, the plaintiff cannot recover. 7. The defendant was not obliged to maintain a wall or barrier that under any and all circumstances, such as the rearing up of a horse, would prevent injury to those travelling on the highway. If the wall or barrier in question here was suitable for the ordinary purposes of travel upon such a road in a country town, it was sufficient. If the plaintiff's horse reared up and placed his fore feet on the top of the wall, but did not go over, and the injuries complained of were thus received, the plaintiff cannot recover."

The judge gave the first, fourth, and sixth requests, and, on the other questions raised, instructed the jury in substance as follows:

It makes no difference whether the accident was occasioned by the plaintiff's horse being frightened by an object either inside or outside of the limits of the highway.

The narrowness of the road is not in itself anything which constitutes a defect in this case. It is not required of towns that they should fence their highways, or that they should erect railings or barriers to prevent travellers from driving out of the limits of the highway, or to prevent unmanageable horses from escaping from the limits of the highway. The railings or barriers are required only when some steep bank or other dangerous object or place exists so near to the travelled road as to make it dangerous to travel on the road. In this case the evidence tends to show that this highway was located twenty feet wide through water where the tide rose and fell on each side. It is not contended by the defendant but that some kind of a railing or barrier was necessary at this point. The question would be whether the railing or barrier was a suitable one. In deciding that, it is for the plaintiff to prove, by a fair preponderance of the evidence, that it was not a suitable railing or barrier. Whether

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or not it was a suitable railing or barrier depends upon whether it was suitable to do that to the ordinary travel which might be expected there, which a railing or barrier is required to do.

Towns are not required to provide barriers to prevent a man from deliberately straying out of the highway, or unmanageable horses from escaping from the highway, nor for persons to sit upon or lean against; neither are they bound to erect and maintain barriers to prevent the getting off from the highway and into dangerous places of extraordinary loads, that is to say, if the strength of a barrier is called in question, if it is sufficient to keep in the highway the ordinary load and team which might be expected along there. If a team of extra weight comes along there and breaks it down, the question would be whether or not it was suitable for the ordinary and usual and expected travel. That would decide the question whether or not it was a suitable barrier. So, in order to determine whether or not there was a suitable barrier, you are to take into account the road as it was, you are to take into account the nature and amount of travel which would reasonably be expected to pass over it, you are to take into account all the circumstances which might reasonably and naturally and ordinarily be expected to attend the travel over and upon that road, and you are to say that the object of the rail is not for people to sit upon or to walk upon, that it is in order to protect them from getting into dangerous places in immediate proximity to the highway by the ordinary things which might be expected to happen upon a highway.

If you find that the railing itself was not such a railing as ought to have been there, then you can find the way defective by reason of its not having been a suitable railing. But it is not decisive of the case if you find that, because, even if there were not a suitable railing in the place, and a railing were required, the fact that there was not a suitable railing is not sufficient to make the town pay damages for an accident that happened at the point where the railing was insufficient, unless you are also satisfied that the presence of a suitable railing would have prevented the injury and the accident. That is to say, you may be entirely satisfied that the railing was not suitable or sufficient, but the accident may be of such a nature that you fail to be satisfied that the presence of a suitable railing would have

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prevented the injury; and if it would not have prevented the injury, then you cannot give the plaintiff compensation in such a case for his injury, because, even if the town had discharged its duty, it would not have prevented the injury from occurring. So if you find that there was a want of a suitable railing, the plaintiff must also satisfy you, by a fair preponderance of the evidence, that, if there had been a suitable railing, the accident and injury would not have occurred.

The evidence tended to show that the plaintiff's horse had shied, and had been for some portion of time without his control. The law with reference to that matter is this. If a horse shies, and an accident occurs, if the shying comes because the horse has a vicious habit of shying, then the man would not be in the exercise of due care in driving such a horse; and an accident occurring from the shying of a horse which came in consequence of a vicious habit of the horse would not be an accident for which the plaintiff could recover. But the law presumes that even gentle horses — or rather it recognizes the fact — may sometimes momentarily and occasionally shy and be without the control of the driver. The law with reference to that is to be stated in this way: If from no vicious propensity of the horse, but from some cause which makes an ordinarily gentle and safe horse suddenly start and shy so that he is momentarily without the control of his driver, if the control of the horse would have been immediately regained by the driver if there had been no difficulty or defect in the way, and, while in this condition of want of control, he comes upon a defect, the plaintiff may recover, provided it appears to the jury as a fact, by a fair preponderance of the evidence, that if the defect of a want of a suitable railing, which is claimed as the defect, had not existed, the driver of the horse would have regained the control of the horse before the defect was encountered, that is, before the obstacle that did the damage was encountered, and so the accident would have been prevented. That is to say, applying the illustration, if one's horse sees some object, and for the purpose of this case I will say either within or without the limits of the highway, and it is ordinarily a safe and gentle horse, and it is suddenly frightened by the sight of this object and so shies, and if while in that act of shying, and before anything like a defect

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or want of repair in the highway has contributed in any way to what is happening, the driver is thrown out, he cannot recover for any damage he receives in being thrown out, because at that time the horse is beyond his control, although the horse might presently have come under his control again. He would not be prevented from recovery by reason of the fact that momentarily the horse had been out of his control; but for an accident that happens while the horse is out of his control by reason of his shying he cannot recover.

When the horse shies and comes upon something which is claimed to be a defect, and which it is claimed the vehicle would not have come in contact with except for the want of a suitable railing, then the question for the jury is this: Can we say that, if there had been a suitable railing there, the control of the horse would have been regained by his driver, and the accident and injury would not have happened? If the plaintiff makes it appear, by a fair preponderance of all the evidence, that that was the state of things, then he can recover. If he fails to show that, then he cannot recover.

There is, perhaps, in this case a very fine point. It is contended here that, if the wall had been higher, the accident would not have happened. It is conceded upon both sides that a wall or barrier of some kind was necessary. This may be the case, that what is erected as a barrier or wall upon the side or within the limits of a highway by the town may be of such a character or nature as in itself to constitute a defect. But the jury must remember this, that no barrier or railing can be erected which is not an obstacle to the progress of a horse or carriage. Its object is to obstruct and stop the progress of a team beyond its limits. So if a horse suddenly shies, and should by shying throw the team against a barrier, and the obstruction caused by the barrier injured the horse or the wagon, or threw out the man, that would not be a cause of action against the town, because it would be the natural and expected result of the very operation of the barrier as a barrier. But on the other hand, if this barrier was so constructed as in itself to be a dangerous object in the highway, and a defect in the highway, the fact that it was intended also as a barrier would not necessarily prevent the plaintiff from recovering upon the ground that it was,

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although a barrier itself, a defect or an obstacle in the highway. In other words, the fact that a certain structure by the side of the highway or in the highway was erected or maintained by the authority of the town, with the intention of having it as a railing or barrier, — a railing or barrier of some kind being necessary at that place, — would not necessarily protect the town from damage for everything that could happen by the existence of that thing there. The fact that it was intended as a barrier would not make it, so to speak, protected. But there would be the question whether or not it was of such a shape and character that it was a defect in the highway.

Then you come to the question whether or not a railing which is too low may also constitute a defect, and for that reason the town or city be liable under some circumstances. The claim here is made that the wall, being about two feet in height, ought to have been higher, and, if it had been higher, the accident would not have happened. With reference to that, all I can say to you is this: if you shall find that the wall as it was there was not a suitable railing or barrier, taking into account the whole location of the place, and the kind and amount of travel, and all those things, and if you shall find that a higher wall would have prevented the accident and injury to the plaintiff, would have enabled the plaintiff to recover the control of his horse, and would have prevented any accident happening, then you may find for the plaintiff, if you believe that that want of height in the railing was the sole cause of the injury.

It is not claimed here that the barrier was of any improper material, or that its perpendicular surface next to the road constituted any defect. For any injury which was occasioned by the striking of the wagon or of the horse against the perpendicular side of the wall, you cannot allow damages. If the plaintiff had been thrown out from his carriage by the striking of the wagon or of the horse against the perpendicular side of the wall, the horse shying at the time, for that injury the plaintiff could not recover. But if solely because this wall was too low, and you believe that the injury occurred by reason of the horse and wagon getting on top of the wall, and, if the wall had been sufficiently high for the purpose of ordinary travel there, the horse and wagon would not have got upon the wall, but the control of

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the horse would have been regained, and the accident averted, then for the consequences of the accident the plaintiff might recover, so far as they came from the horse or wagon getting on the wall because too low. That, as it seems to me, is as far as the law would allow the plaintiff to go, and for the purposes of the case I instruct you that that is the law to govern the case.

There is certain evidence in the case that was introduced solely on the question of notice, which you must not consider in any other view of the case. That is, there has been some intimation in the case that some difficulty may have occurred upon this bridge or causeway before. It would not be competent for a plaintiff to show that other accidents had happened at the same place in order to show that the way was defective. If there is before you any evidence tending to show anything of that kind, it is not to be considered by you upon the question as to whether there was any defect in the way or not. It simply bears on the question of notice. It only bears upon that in this way. It is competent for witnesses to say, that upon such and such a time they gave such and such information to the authorities of the town. The question of notice is to be tried upon what were the circumstances of any alleged notice.

There was testimony in the case, other than that of Dr. Shurtleff, to which the last instruction would apply.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

H. K. Braley, for the defendant.

A. J. Jennings, (*J. M. Morton* with him,) for the plaintiff.

FIELD, J. This is an action to recover damages for an injury received through want of a sufficient railing in or upon a highway, on the ground that the defect might have been remedied, or the injury prevented, by reasonable care and diligence on the part of the town. The damages are recoverable from the town by law obliged to repair the way, if it "had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence" on its part. Pub. Sts. *c.* 52, § 18.

It was contended that the railing was insufficient because it was not of proper height. The second and third requests for instructions ought not to have been granted if the railing was insufficient, and the plaintiff did not lose control of the horse,

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and if the injury would not have been received if the railing had been sufficient. The instructions given relating to the fact that the horse became frightened, and the effect of this upon the plaintiff's right of action, were correct. *Stone* v. *Hubbardston*, 100 Mass. 49, 55. *Babson* v. *Rockport*, 101 Mass. 93. *Britton* v. *Cummington*, 107 Mass. 347. *Wright* v. *Templeton*, 132 Mass. 49.

The fifth request ought not to have been granted. It was the duty of the town to keep the way "reasonably safe and convenient for travellers;" Pub. Sts. *c.* 52, § 1; and to put up a sufficient railing or barrier, if the barrier constructed by the commissioners was not sufficient, and if a railing or barrier was required to make the way reasonably safe.

The seventh request ought not to have been granted, because, if the wall was insufficient, and the way not reasonably safe, it was not necessary that the horse "should go over the wall" in order to enable the plaintiff to recover. If the injury was received because the wall was not high enough, and the want of height made it insufficient as a railing or barrier, the plaintiff could recover, if the horse was a reasonably safe horse to drive, and if the plaintiff was in the exercise of due care and did not lose control of the horse, or lost control for a moment only, and either regained the control or would have regained it before the horse would have run against the wall, if it had been of sufficient height.

If the injury would not have been received if the wall had been of sufficient height, and this want of height rendered the way unsafe, then the insufficient wall was the immediate cause of the injury. We do not know that the plaintiff's horse would have run against the wall if it had been of sufficient height, and this defect in the height of the wall may have been the sole cause of the injury. We think that there was evidence for the jury of all the facts necessary to be proved, and that the court rightly refused to direct a verdict for the defendant.

It appears that certain evidence was introduced "solely on the question of notice," which means notice to the town of the height of the wall and of the condition of the way. If the wall was insufficient and the way unsafe, it is immaterial what the authorities of the town thought about it, if they knew the facts.

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Notice of a defect is notice of that condition of things which constitutes a defect, although the authorities of the town may think that it does not constitute a defect. This wall was a permanent structure, built in 1854, and was rebuilt and raised about six inches in height in 1885 by the highway surveyor of the defendant town. The plaintiff was injured on May 29, 1886. If the wall was insufficient as a railing or barrier, we have no doubt that, on the undisputed facts, it must be held, as matter of law, that the town either "had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence" on its part. The wall was a structure which was visible and conspicuous, and had existed for so long a time that the town ought to have known its condition and height, and ought to have known that it was insufficient, if in fact it was insufficient. Besides, the fact that the wall had been rebuilt in 1885 by the highway surveyor of the town, and remained in the same condition as when rebuilt by him, was equivalent to notice to the town of its condition and height. "There is no occasion to prove actual notice to a city or town of its own acts, or of acts which are constructively its own." *Monies* v. *Lynn*, 119 Mass. 273, 275. *Brooks* v. *Somerville*, 106 Mass. 271.

In *Donaldson* v. *Boston*, 16 Gray, 508, 511, it was said: "Mere proof of notice to one or more of the inhabitants does not establish the requisite notice, because it is not their duty to repair the defect or remove the obstruction. The facts must be such as to lead to the inference that the proper officers of the town, whose duty it is to attend to municipal affairs, did actually know of the existence of the defect, or with proper vigilance and care might have known it. Such knowledge may be inferred from the length of time during which the defect has existed, from the central position and publicity of the place where it exists, and any other circumstances which tend to show its notoriety." This is the rule of law under existing statutes. *Hanscom* v. *Boston*, 141 Mass. 242.

The evidence of Dr. Shurtleff was admitted, not "as tending to show that there was any defect, or that there had been any accident," but "as bearing on the question of notice to the authorities of the town," and it appears that there was other testimony of the same kind. The presiding justice carefully limited

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the relevancy of this evidence to "the question of notice." We think that conversations about an accident or a defect in a way, between persons no one of whom is an officer of the town, is not competent evidence to show notice to the town, although the conversations may have been had between many different persons. It cannot be inferred that the conversations were heard by other persons than those shown to have heard them. Whether a public notice of a defect in a highway by advertisement in a newspaper or in some other public manner, would be evidence to the town, need not be decided. The evidence, therefore, was inadmissible for the purpose for which it was received, and it is clear that it was not admissible for any other purpose.

But the evidence was admitted to prove a fact which it was unnecessary to prove, if the other facts we have referred to had been proved or admitted, and the exceptions so recite. Exceptions will not generally be sustained because incompetent evidence has been received to prove a fact which the conceded facts necessarily establish. The real complaint is, that the evidence tended to prejudice the defendant with the jury, because, however careful the instructions of the court may have been, the jury would be likely to consider the evidence of a previous accident as evidence that the defendant was in fault, and ought to have repaired the way. There is some force in this, and it would undoubtedly be within the power of the court to sustain these exceptions on this ground, if satisfied that injustice had been done; but we are not satisfied that injustice has been done. *Exceptions overruled.*

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JOB T. WILSON *vs.* CHARLES WINSLOW & another.

Bristol. Oct. 26. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

An assignee in bankruptcy made a contract with the bankrupt to convey to him a parcel of land belonging to the estate, and was authorized by a decree of court so to convey it. At the request of the bankrupt, after the price was paid, the land was conveyed to the bankrupt's wife, and the deed was delivered to him as his wife's agent. *Held*, that the conveyance was valid, and that the bankrupt could not maintain an action for a subsequent trespass committed on the land.

HOLMES, J. This is an action for the conversion of certain wood, and for trespass to land which had belonged to the plaintiff before he went into bankruptcy. The defendants claim title as devisees of the plaintiff's wife, to whom the plaintiff's assignees in bankruptcy conveyed the premises.

The first difficulty which the plaintiff has to encounter in the attempt to maintain an action at law is, that, if the conveyance were void, the legal title would be in the assignees, not in him. *Bacon* v. *Abbott*, 137 Mass. 397. But the conveyance was valid. It was authorized by the decree giving the assignees leave to sell to the plaintiff, as the plaintiff requested that it should be made to his wife, after the price was paid as required by the decree. For the same reason, the plaintiff could not set up that the conveyance was against the terms of the assignees' contract with him, if it was, and if that fact would make any difference on a question of legal title. The court found that the deed was delivered to the plaintiff as his wife's agent, and the exceptions state that there was evidence to support the finding. We see nothing in the case requiring discussion. The suggestion that a conveyance by assignees to the bankrupt's wife is void, on the same grounds as a sale on execution to the debtor's wife, is plainly unfounded. In the latter case the officer has only a power, and the title would pass direct from husband to wife. *Stetson* v. *O'Sullivan*, 8 Allen, 321. In the former, the assignees have title in themselves. *Exceptions overruled.*

J. M. Wood, for the plaintiff.

J. M. Morton, for the defendants.

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JOHN H. CALLAGHAN *vs.* D. W. WHITMARSH & another.

Bristol. Oct. 26. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

The service upon the creditor's attorney of the original notice of the desire of a person arrested on execution to take the oath for the relief of poor debtors is, so far as the rights of the creditor are concerned, a sufficient compliance with the requirement of the Pub. Sts. *c.* 162, § 32, that such notice shall be served by giving to the creditor, his agent or attorney, "an attested copy thereof."

CONTRACT, against D. W. Whitmarsh and Alvin C. Brownell, upon a poor debtor's recognizance, entered into on September 3, 1886, under the Pub. Sts. *c.* 162, § 28, by the first-named defendant as principal, and the other defendant as surety, and containing the usual conditions. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

L. E. White, for the defendant surety.

F. V. Fuller, for the plaintiff.

FIELD, J. It appears by the agreed statement of facts that "the only alleged breach of the recognizance whereby the plaintiff seeks to recover is the fact that the notice required to be given by the Pub. Sts. *c.* 162, § 32, to the judgment creditor," was served by the officer's giving in hand to the creditor's attorney the original notice, instead of an attested copy. At the argument, it was contended, among other things, that the subsequent proceedings before the magistrate were void, because he could not have had before him the notice, with the officer's return of service upon it. The record of the magistrate is not before us, and it is consistent with the agreed statement of facts that the officer served the original notice, and made his return to the magistrate upon an attested copy. We are not required to determine the validity of these subsequent proceedings.

In *Young* v. *Capen*, 7 Met. 287, it was held that reading a notice to a creditor was "not a compliance with the statute, literal or substantial," which required that the notice be served by delivering an attested copy, and it was said that "the service

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required by the statute is manifestly more beneficial and useful than reading."

It is manifest that delivering the original notice is as beneficial and useful to the creditor as delivering an attested copy. The argument is, that there must be a literal compliance with the statute, and that the statute requires service by an attested copy. That errors in the terms of the notice which have no tendency to mislead the creditor do not make it insufficient, if properly served, has been often decided. *Calnan* v. *Toomey*, 129 Mass. 451.

In *Wilbur* v. *Ripley*, 124 Mass. 468, the court reversed a judgment entered upon default in a writ of entry, because an attachment of the defendant's property had been made, and the service of the writ was by leaving an attested copy, and not by leaving an original summons. The statutes then in force provided that, "when goods or estates are attached, ... there shall be a separate summons, to be served on the defendant after the attachment, and the service thereof shall be a sufficient service of the original summons." Gen. Sts. *c.* 123, § 11. This separate summons was required to be served by delivering it to the defendant, or by leaving it for him; but an original summons without an attachment was required to be served by reading it to the defendant, or by delivering to him an attested copy, or by leaving such copy for him. § 23. A separate summons informs the defendant that his goods or estate have been attached to an amount expressed in the summons, while the writ contains only a command to attach them. St. 1784, *c.* 28, § 1. The two are not literally or substantially duplicates or copies one of the other.

In the case at bar, the service of the notice was not the commencement of the proceedings. The defendant Whitmarsh had been arrested upon execution, and, desiring to take the oath for the relief of poor debtors, but not desiring a time fixed for his examination, had entered into a recognizance with Brownell, the other defendant, as surety, before a magistrate, pursuant to the Pub. Sts. *c.* 162, § 28. The notice given was for the purpose of informing the creditor that Whitmarsh desired to take the oath at a certain time and place expressed in the notice. This notice must be in writing, and signed by the magistrate in his official

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capacity. § 31. The contents of the original and of the copy are the same. The statute intended that the creditor should have a notice in writing, in order to insure the certainty which a writing gives; but whether the officer should deliver the original, and return a copy, or the reverse, is a matter of statutory regulation, made for the purpose of directing the manner in which the notice should be served. So far as the rights of the creditor are concerned, we think that the service in this case was a substantial compliance with the statute, and that a literal compliance was unnecessary. See *Eaton* v. *Miner*, 5 N. H. 542.

Judgment for the defendants.

ADONIRAM J. MARBLE *vs.* EMMA S. MELLEN.

Bristol. Oct. 26. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

In an action upon a paper writing, signed by the defendant, a married woman, and reciting the receipt from the plaintiff of a certain sum to be paid to him in the stock of a certain corporation, or in cash, within a time named, the plaintiff testified that he and the defendant's husband made a settlement, at the latter's house, of demands which the plaintiff had against him; that the husband proposed to give to the plaintiff in settlement the stock named in the paper declared on, or a certain sum, in ten days; that the husband said that the stock was in the defendant's name; that she was in the house, but was not present in the room with them; that the husband wrote the agreement, and left the room to get his wife's signature to the paper; and that he soon returned with the paper signed by her. The defendant and her husband were present at the trial, but did not testify. *Held*, that the judge properly submitted to the jury the question whether the defendant knew of the consideration for her agreement.

CONTRACT, in two counts. The first count was for money had and received to the plaintiff's use. The second count was upon the agreement contained in the following paper, dated October 1, 1881, and signed by the defendant: "Received of A. J. Marble two thousand and sixty-two dollars and fifty cents, to be paid to said Marble in stock at its par value in the Lewiston and Auburn Horse Railroad Co., or in cash, within ten days." The answer admitted that the defendant signed the agreement set forth in the declaration, but denied that she received any money or other

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valuable or good consideration therefor; alleged that the same was without consideration, and that she did not owe the plaintiff anything; and denied each and every allegation in the declaration, except that she signed said writing.

Trial in the Superior Court, before *Mason*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff testified that, on October 1, 1881, he went to the house of George F. Mellen, the husband of the defendant, at his request and by previous appointment with him, for the purpose of a settlement with him of various claims which the plaintiff had against him, including certain notes and $3000 in cash which he had lent him; that, after figuring up, it was agreed that the amount in suit was due from the defendant's husband to the plaintiff on certain of their transactions; that the defendant was in the house at this time, but was not present during any of the transactions between the plaintiff and her husband in the room; that the husband proposed to give the plaintiff stock in the Lewiston and Auburn Horse Railroad Company at par, or cash in ten days in settlement, and said that the stock was in his wife's name, and he should have to get her to sign the agreement; that the defendant's husband thereupon wrote the agreement, and went out of the room to get his wife's signature, and in a few minutes came back with the paper signed; that the plaintiff then gave up to him the notes included in the settlement, which bore the indorsement of the defendant's husband and of the firm of which he was a member, and amounted to $1200 or $1400, with said paper, in settlement of the same and of the money lent; and that no money or property was given to the defendant, and no demand was ever made upon her personally, but a demand was afterwards made on her husband.

The defendant and her husband were both in court during the trial, but neither was called as a witness, nor was the deposition of either taken.

The defendant asked the judge to rule, that, upon the whole evidence, the plaintiff could not recover, and to direct a verdict for the defendant, upon the ground that there was no evidence that the defendant had any knowledge of the consideration for her agreement. The judge refused to rule as requested, but submitted the question of the defendant's knowledge of the

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consideration to the jury, with full instructions, to which no exception was taken.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. F. Jackson & D. F. Slade, for the defendant.

J. M. Morton & A. J. Jennings, for the plaintiff.

DEVENS, J. The ruling of the presiding judge submitted to the jury the question whether the defendant knew of the consideration for her agreement. She has no ground of complaint, if there was evidence sufficient to go to the jury of such knowledge. Direct evidence was not necessary. It could be inferred from the conduct of the party.

The instrument recited an adequate money consideration, and was signed by the defendant. The plaintiff's testimony was that he made a settlement of certain demands with the defendant's husband at his house; that the husband was to transfer to him the stock described in the paper signed by the defendant; that the defendant was in the house, but not in the room; and that the husband went out of the room to get her to sign the paper, as the stock was in her name, and soon returned with it. It further appeared that the husband and the defendant were present at the trial, heard the plaintiff's testimony as to the transaction, did not contradict it, and did not testify that the defendant did not know of the consideration. Upon these facts, it could not have been ruled that there was no evidence to go to the jury, who might fairly have inferred that, even if the money consideration recited was not the actual one, the real consideration, namely, the settlement between her husband and the plaintiff, was known to the defendant. *Exceptions overruled.*

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WILLIAM WHEATON *vs.* MARGARET TRIMBLE.

Bristol. Oct. 27. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

Evidence that a husband had the general management of premises belonging to his wife, that he employed A. to perform labor upon a house on the land, that the wife knew that A. was working on the house, and that she gave him directions as to parts of the work, will justify a finding that the husband, in employing A., acted as the duly authorized agent of the wife.

PETITION to enforce a mechanic's lien, under the Pub. Sts. *c.* 191. Trial in the Superior Court, without a jury, before *Knowlton*, J., who found for the petitioner; and the respondent alleged exceptions. The facts appear in the opinion.

H. J. Fuller, for the respondent.

L. N. Francis, for the petitioner.

MORTON, C. J. The labor for which the petitioner seeks to enforce a lien was performed by him upon the house of the respondent. He was employed by the respondent's husband; and the presiding justice, who tried the case without a jury, has found that, in employing the petitioner, the husband acted as the duly authorized agent of the respondent. The only question before us is whether there was evidence to justify this finding. There was evidence tending to show that the work was done upon her house, and was for her benefit; that she knew that the petitioner was working upon the house, and was present at different times, and personally gave him directions as to parts of the work; that she selected the papers for the upper rooms, and the bills for them were afterwards paid by her husband. The husband and wife both testified that he was not her agent; but, upon cross-examination, she testified that "her husband manages the property just as he used to when it was his, that she allows him to go ahead and do just as he pleases with the whole property, and that ever since it has been in her name he has managed it just as he did before." It was for the court to determine what credit should be given to their testimony. Considering the relation which she bore to her husband and to the estate, that she knew the petitioner was working for her benefit, and took part in directing his work, and that she

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substantially testified that she had put the general management of the property in the hands of her husband, it is not an unreasonable inference that, in contracting with the petitioner, the husband was acting as her authorized agent. The evidence is quite as strong as it was in the case of *Arnold* v. *Spurr*, 130 Mass. 347, in which it was held that the question of agency should have been submitted to the jury.

Exceptions overruled.

ANN TOMLINSON & others *vs.* SARAH BURY & others.

Bristol. Oct. 27. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ., absent.

A bequest of the testator's "bank stock" is to be construed as describing deposits in savings banks owned by the testator, if he owns no shares of stock in a bank.

A bequest of "all the mill stock and bank stock remaining in my name after the decease of my said wife" is specific, and not general.

If shares of stock, specifically bequeathed by a will, are appropriated to satisfy the claims of the testator's widow, who has waived the provisions of the will in her favor, the legatee is entitled to contribution from other legatees under the will.

BILL IN EQUITY, by certain legatees under the will of John Tomlinson, to obtain contribution from other beneficiaries under said will. At the hearing in the Superior Court, a decree was ordered for the plaintiffs; and the defendants appealed to this court. The facts appear in the opinion.

M. Reed, for the defendants.

J. M. Morton & A. J. Jennings, for the plaintiffs.

DEVENS, J. The parties litigant have agreed, if the plaintiffs, whose legacy has been appropriated to the claims of the widow, are entitled to contribution from other legatees, as to the amount to which contribution shall be made, and also as to the proportions in which it shall be distributed. This leaves open as the only question for discussion whether they are thus entitled. This depends apparently upon the inquiry whether the legacy to them is to be held as specific or general. The rule is well settled that, if a legacy is specific, and is appropriated to

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the payment of debts, the legatee (if the general or residuary legacies are not sufficient) is entitled to contribution from the holders of other specific legacies. *Farnum* v. *Bascom*, 122 Mass. 282. Nor is there any distinction between such a case and one where a specific legacy is appropriated to satisfy the lawful claims of the widow of the testator, who has waived the provisions of the will made in her favor. To the extent to which a specific legacy has been taken by the widow, the legatee would be entitled to contribution, as much as if it had been taken for the payment of debts. It is equally well settled that, if the claim for contribution of the plaintiffs rested upon the fact that they were residuary legatees, it could not be maintained. Nothing is given by a residuary clause except upon the condition that something remains after all paramount claims upon the testator's estate are satisfied. *Richardson* v. *Hall*, 124 Mass. 228, 233.

The gift to the plaintiffs by the fourth clause of the testator's will was "all the mill stock and bank stock remaining in my name after the decease of my said wife." The plaintiffs were also residuary legatees and devisees under the sixth clause of the will, but they make, and could make, no claim on that account to any contribution. The words "bank stock" are to be construed as describing the testator's deposits in various savings banks. He had no shares of the capital stock of any bank, nor any other property in banking associations, and, while the expression is not accurate, it must be held, under these circumstances, to describe these deposits. The question is not of importance in the case at bar, as, if there is a specific legacy of the "mill stock," which has been taken, the plaintiff would be entitled to contribution from the other legatees, and the amount has been agreed upon. Specific legacies are held to contribute proportionally to the charges on the estate, unless from the expressions of the will, or from the position of the legatee, as where he receives a legacy in lieu of a debt or claim against the estate, it is seen that such legacy is entitled to a preference. *Farnum* v. *Bascom*, *ubi supra*. There is a presumption of intended equality between general legatees as a class, and between specific legatees as a class. A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator, so that it can be identified. It can only

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be satisfied by the thing bequeathed; if that has no existence, when the bequest would otherwise become operative, the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator. Tried by these tests, the legacy of the testator's "mill stock and bank stock" must be held specific. It could only be satisfied by this mill and bank stock, and if the testator had disposed of them, or of any part of them, to that extent the legacy would have been adeemed.

Nor, in considering whether the legacy is specific, is it important that it was of such of these stocks as remained after the decease of his wife. He had bequeathed to her "the use, improvement, and income, of all" his estate, real and personal; he may have anticipated that it might suffer some diminution during her life, but, whether he did so anticipate or not, the subject of the gift was distinctly defined.

The defendants contend that this case comes within a class of cases where it has been held that a gift of all a testator's personal estate, enumerating the various classes, has been held to be general, and not specific. *Hays* v. *Jackson*, 6 Mass. 149. *Howe* v. *Dartmouth*, 7 Ves. 137. *Brummel* v. *Prothero*, 3 Ves. 111. *Walker's estate*, 3 Rawle, 229. *Woodworth's estate*, 31 Cal. 595. But the reason why it has been thus held is that in those cases no intent was shown to give a distinct part of the estate, nor to separate a portion thereof from the residue, but rather an intent to give the whole. A bequest is not the less specific because it includes numerous articles. A bequest of all the horses which the testator may own, of all his plate, of all the books in his library, or of all the horses, cattle, and farming tools on a particular farm or farms, is specific. *Stephenson* v. *Dowson*, 3 Beav. 342. *Borden* v. *Jenks*, 140 Mass. 562.

In the case at bar, the mill and bank stock were, by the bequest, separated and distinguished from the testator's other personal property. *Decree affirmed.*

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COMMONWEALTH *vs.* BENJAMIN F. SHAW.

Essex. November 1. — 23, 1887. DEVENS & KNOWLTON, JJ., absent.

The description, in an indictment for embezzlement, of the property embezzled as "thirteen hundred and twenty pairs of shoes, each pair of the value of one dollar, of the property" of a person named, is sufficient.

At the trial of an indictment for the embezzlement of goods of A., it appeared in evidence that A., after the time of the alleged embezzlement, charged the defendant, in a certain conversation, with having spent the money he had collected from the sales of the embezzled property in gambling in stocks. The defendant, in testifying in his own behalf, denied that such a conversation took place; and, on cross-examination, he was asked "if he had been engaged in stock gambling" at a place named. The defendant objected to this question, but was required to answer it. *Held*, that he had no ground of exception.

INDICTMENT, in two counts, for the embezzlement, on December 15, 1886, and on January 15, 1887, respectively, of "thirteen hundred and twenty pairs of shoes, each pair of the value of one dollar, of the property" of Warren D. Hill and Frank B. Lippincott.

In the Superior Court before the jury were empanelled, the defendant moved to quash the indictment, for the following reason: "Because there is in said indictment no sufficient allegation or description of the property alleged to have been embezzled." This motion was overruled; and the defendant excepted.

At the trial, before *Brigham*, C. J., it was not contended by the government that more than thirteen hundred and twenty pairs of shoes were embezzled. It appeared in evidence that Warren D. Hill, one of the persons from whom it was alleged that said goods were embezzled, after the time of the alleged embezzlement, charged the defendant, in a certain conversation, with having spent the money he had collected from the sales of said embezzled property in gambling in stocks. The defendant, in testifying in his own behalf, denied that such a conversation took place; and, on cross-examination, among other things, he was asked if he had been engaged in stock gambling at J. P. Welsh's office, in Lynn. He was also asked if he had been engaged in stock gambling at Wood's office, in Boston. The

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defendant objected to said questions; but the objection was overruled, and the defendant was required to answer the same.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. H. Sisk, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

FIELD, J. The property alleged to have been embezzled is described as "thirteen hundred and twenty pairs of shoes, each pair of the value of one dollar, of the property," &c. This is a sufficient description. The word "shoes" must be taken to mean shoes for the feet of human beings, and a description of a chattel by its proper and special name is sufficient. *Commonwealth* v. *Butterick*, 100 Mass. 1. 3 Chit. Crim. Law, (2d ed.) 961.

We do not clearly understand what is meant by stock gambling in the exceptions, but the point of the inquiry is shown by the statement that there was evidence that Hill had "charged the defendant, in a certain conversation, with having spent the money he had collected from the sales of said embezzled property in gambling in stocks." The defendant, testifying in his own behalf, could be asked, on cross-examination, if he had not spent considerable sums of money in stock gambling, or in anything else, and could be asked how he obtained the money. Such an examination should be confined to a period of time subsequent to that of the embezzlement. The questions asked were general, but it does not appear that the defendant was compelled to answer questions concerning any stock gambling in which he was engaged before the time when the evidence tended to show that he had embezzled the property described in the indictment. *Exceptions overruled.*

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COMMONWEALTH *vs.* WILLIAM SNEE.

Essex. November 4. — 23, 1887. DEVENS & KNOWLTON, JJ., absent.

At the trial of a complaint for keeping intoxicating liquors with intent to sell the same unlawfully, a police officer testified for the government to facts tending to show that liquor was kept for sale, on the day alleged, in a certain saloon, and to the presence of the defendant there on that day, and also to acts of the defendant at different times before said day, tending to show that he was the keeper of the place. On cross-examination, the witness testified that he had seen A., the defendant's brother, about the saloon before said day, but not so frequently as he had seen the defendant; and that he had never seen any specific acts of A. about the saloon. The witness was then asked if he had not sworn to a complaint to search, charging A. as the owner of liquors at that place; and he admitted that he had, and identified a certified copy of a complaint shown to him as a true copy of a complaint against A., sworn to by the witness on the day named in the present complaint. The defendant offered said certified copy in evidence to contradict the witness; but the judge excluded it. *Held*, that it should have been admitted.

COMPLAINT alleging that the defendant, on July 17, 1887, at Haverhill, kept intoxicating liquors with intent to sell the same unlawfully in this Commonwealth. Trial in the Superior Court, before *Sherman*, J., who allowed a bill of exceptions, in substance as follows:

Austin C. Sprague, a police officer, testified for the government to facts tending to show that liquor was kept for sale on the day named in the complaint in a certain saloon, in Haverhill, and also as to the presence of the defendant in said saloon upon that day, while a search was being made therein for intoxicating liquors, and to certain acts of the defendant at different times before said day tending to show that the defendant was the keeper of the place, it appearing that Martin E. Snee, the defendant's brother, was not present on said day. On the cross-examination of Sprague, it appeared that he had seen Martin E. Snee about said saloon before said day, but not so frequently as he had seen the defendant; and that he had never seen any specific acts on the part of Martin E. Snee about said saloon.

Sprague was also asked, on cross-examination, if he had not sworn to a complaint to search, charging said Martin E. Snee as the owner of liquors at that place, and he answered, without objection, in the affirmative.

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Sprague was then shown a certified copy of a complaint to search, and identified the same as a true copy of the process which he had sworn to upon the said July 17, against Martin E. Snee.

The defendant introduced evidence tending to explain his presence as an innocent one, on said day; also the testimony of the owner of the building that Martin E. Snee was the tenant of said saloon at said time, and other testimony tending to control the testimony of Sprague as to acts of the defendant prior to said date. The defendant then offered in evidence said certified copy, as tending to contradict Sprague in his testimony, and for any purpose for which it might be competent. To this evidence the government objected, and the judge excluded it.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

B. F. Brickett & C. H. Poor, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

FIELD, J. The certified copy of the complaint offered in evidence by the defendant was competent to contradict the witness Sprague. The fact that, on cross-examination, the witness admitted that he had signed and sworn to such a complaint, and identified the copy as a true copy, rendered the contents of the complaint admissible, so far as they tended to contradict the witness, and the contents of the complaint were not offered in evidence during the cross-examination. The defendant, when putting in his defence, offered this copy in evidence. To what extent it tended to contradict the witness, and what weight it was entitled to, in view of the whole evidence and the contentions of the government, we do not know; it plainly had some tendency to contradict the witness, and its rejection may have prejudiced the defendant. *Exceptions sustained.*

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GEORGE STONE *vs.* ISAIAH GRAVES, administrator.

Essex. November 4. — 23, 1887. DEVENS & KNOWLTON, JJ., absent.

It cannot be ruled, as matter of law, that the work of shaving an aged and infirm person in his own house on the Lord's day is not a work of necessity.

CONTRACT, upon an account annexed, for services rendered to Samuel Graves, the defendant's intestate.

At the trial in the Superior Court, before *Hammond*, J., without a jury, it appears that the services rendered were the shaving of the beard of the defendant's intestate for a number of years before his death; that the intestate was over eighty years of age, and had received an injury to his shoulder, which made it difficult for him to shave himself; and that the shaving was all done at the house of the intestate, by the plaintiff, who was a shoemaker by trade, and mostly on the Lord's day.

The defendant asked the judge to rule that the plaintiff could not recover for the services rendered on the Lord's day. But the judge declined so to rule, and found as a fact that the services rendered on the Lord's day were works of necessity.

The defendant also asked the judge to rule that there was no evidence to warrant a finding that the shaving of the beard of the defendant's intestate on the Lord's day was a work of necessity. But the judge declined so to rule; and found for the plaintiff for the full amount of his claim.

The defendant alleged exceptions.

E. F. P. Smith, for the defendant. The doing of "any manner of labor, business, or work, except works of necessity and charity," on the Lord's day, is prohibited by the Pub. Sts. *c.* 98, § 2.

In *Phillips* v. *Innes*, 4 Cl. & Fin. 233, it was held that shaving and hair-cutting were not works of necessity. Lord Chancellor Cottenham said: "This work [shaving] is not a work of necessity, nor is it a work of mercy, it is one of mere convenience." See also *Commonwealth* v. *Jacobus*, Leg. Gaz. Rep. 491.

It is no sufficient excuse for work on the Lord's day, that it is more convenient or profitable if then done than it would

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be to defer or omit it. *Jones* v. *Andover*, 10 Allen, 18. *Commonwealth* v. *Sampson*, 97 Mass. 407. *McGrath* v. *Merwin*, 112 Mass. 467.

"The necessity contemplated by the exception in the statute was the necessity of the person who worked, and not of him who compelled the work. . . . . Gain, in fact, was the object of the master; and such work, being for hire merely," is not a work of necessity. Lord Brougham, in *Phillips* v. *Innes*, *ubi supra*.

The ordinary business of the plaintiff being that of a shoemaker, it was not necessary for him to do the work of a barber on the Lord's day.

H. P. Moulton, for the plaintiff.

FIELD, J. It appears that Graves, the defendant's intestate, was an old man, whose shoulder had been injured, and who could not well shave himself; and that the work of shaving him was done by the plaintiff, not in a public shop, but in the house of Graves. If Graves wished to be shaved on the Lord's day in his own house, we cannot say, as matter of law, that it was not morally fit and proper that the plaintiff should shave him.

Exceptions overruled.

SAMUEL GOLDENBERG *vs.* NATHAN F. BLAKE & another.

Suffolk. November 9.—23, 1887. DEVENS & W. ALLEN, JJ., absent.

In an action upon a poor debtor's recognizance, entered into under the Pub. Sts. c. 162, § 28, if the service upon the creditor of notice of the debtor's desire to take the oath for the relief of poor debtors is insufficient, by reason of the fact that the officer read the notice to the creditor instead of giving him a copy of it, but it appears that the creditor told the officer that he understood the notice and would attend the hearing appointed for the examination of the debtor, the question whether the creditor waived due service of the notice should be submitted to the jury.

CONTRACT, against Nathan F. Blake and John G. Daggett, upon a poor debtor's recognizance, entered into on September 20, 1886, under the Pub. Sts. *c.* 162, § 28, by the first-named defendant as principal, and the other defendant as surety, and

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containing the usual conditions. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, in substance as follows:

It was admitted that the defendant Blake was duly arrested upon an execution in favor of the plaintiff, on September 20, 1886, and on the same day, before Edward J. Jones, a master in chancery, entered into the recognizance declared on; that, on October 13, 1886, Blake, desiring to take the oath for the relief of poor debtors, applied to said Jones, as master in chancery, to fix a time and place for his examination; and that thereupon Jones issued a notice to the plaintiff, fixing the time and place of the examination as October 15, 1886, at his office in Boston, at three o'clock in the afternoon.

It was further admitted, that, at the time and place named therein, Blake appeared before said master in chancery, and, no one appearing in behalf of the plaintiff, took the oath for the relief of poor debtors in the form prescribed by statute, and was discharged. Before the hearing, the attorney for the plaintiff appeared before the master in chancery, and objected to the master's jurisdiction on account of the service of the notice, and left before the expiration of the hour.

The defendant introduced evidence tending to show that the notice was handed by Blake to one Moses P. Brown, a constable, on October 14, for service upon the plaintiff; that Brown took the notice and called with it upon the plaintiff at the latter's residence and place of business in East Boston, between twelve and one o'clock in the afternoon of October 14; that he then read the notice to the plaintiff, and asked him if he understood it, to which the plaintiff replied, "Yes;" that he then asked the plaintiff if he would come, to which the plaintiff replied, "Yes;" that Brown and the plaintiff then had some talk in regard to the plaintiff's claim against Blake, and Brown left; that the next morning Brown, in preparing his return, found that the service of the notice should have been by copy, and thereafter he prepared a copy, dating the copy October 14, and at about eleven o'clock on October 15, the day of the hearing, called with the copy at the plaintiff's residence, and, not finding him in, left it with the plaintiff's wife. Brown then made his return upon the notice.

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The plaintiff introduced evidence tending to show that, at the time the constable read to him the notice, the constable asked him if he understood it, and he replied, "Yes;" that the constable asked him if he would come, and he replied, "I will see about it." The plaintiff also testified, on cross-examination, that he knew Brown was a constable; and that he understood the notice when it was read to him.

At the close of the evidence, upon the plaintiff's motion, the judge instructed the jury that there was no evidence for the jury of waiver of the service of the notice in the form provided by law; and directed a verdict for the plaintiff. The defendant Daggett alleged exceptions.

C. T. Russell, Jr., for the defendant.

J. F. Kilton, for the plaintiff.

C. ALLEN, J. It is conceded that the service of notice upon the plaintiff was not in conformity to the requirement of the statute; and the only question is whether the presiding judge ought to have submitted to the jury the question whether the plaintiff waived due service. Upon consideration of this question, as the case is presented upon the bill of exceptions, we do not find that the conduct and language of the plaintiff were such as necessarily to exclude the supposition contended for by the defendant. Clearly, an actual appearance by the plaintiff at the time and place appointed for the hearing, without objection to the service, would be a waiver. A promise or a declaration of intention to appear might or might not amount to such a waiver. In order to waive a legal service, there must have been an intention to waive a known right, or at least a willingness to accept the service as sufficient, without caring to inquire whether it was legally sufficient or not. If it should be shown, or if it could fairly be inferred from the appearance of the plaintiff, who was a witness, that he was aware that the service was insufficient, and yet told the constable that he would attend the hearing, it might perhaps be a reasonable inference that he waived a more formal service. If, on the other hand, both he and the officer supposed, at the time the service was made, that it was in due form, and the plaintiff under that supposition merely declared a present intention to attend the examination, meaning, however, to stand upon all his rights, and not to waive

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any objection for insufficiency of service, and if the officer was not thereby misled into omitting to make further service seasonably, there was no waiver. This apparently was the view of the facts which was taken by the court. But we cannot say that the language and conduct of the plaintiff were not susceptible of the other construction, and think that the question of waiver should have been submitted to the jury. *Williams* v. *Kimball*, 135 Mass. 411; *S. C.* 132 Mass. 214. *West* v. *Platt*, 127 Mass. 367. *Exceptions sustained.*

JOHANNA TRACY *vs.* JOHN A. LINCOLN.

Middlesex. November 10. — 23, 1887. DEVENS & W. ALLEN, JJ., absent.

A. borrowed a sum of money from B., and gave him a promissory note therefor, secured by a mortgage of personal property which he had formerly owned, but which he had previously conveyed to his wife, through a third person. Afterwards A., not having paid any part of the sum so lent to him by B., borrowed from B. another sum, and gave him a promissory note for the amount of both loans, secured by another mortgage of the same property; and B. surrendered to A. the first mortgage and note. Both mortgages were duly recorded. A. died without having paid any part of the second mortgage, and B. took possession of the property under a foreclosure of the mortgage. A.'s wife was present and heard A. and B. making the arrangements for the first loan, and knew such loan was to be made on the security of a mortgage of her property, but did not inform B. of her claim to the property; and B. did not know of such claim until after A.'s death. In an action by A.'s wife against B. for conversion of the property, the judge ruled that the plaintiff's conduct would create an estoppel against her as to the first mortgage and note, but not as to the second, if the first were in fact paid by the second; and that the giving of the second was *prima facie* payment of the first. *Held*, that the defendant had no ground of exception.

TORT, for the conversion of certain personal property. Trial in the Superior Court, before *Thompson*, J., who allowed a bill of exceptions, in substance as follows:

The evidence showed that the property alleged to have been converted was owned by Patrick Tracy, the husband of the plaintiff; that he conveyed the property on October 10, 1883, to William H. Ryan, who, on the same day, conveyed the same

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to the plaintiff; that the plaintiff paid Ryan $400 for the property; that Ryan paid the money to the plaintiff's husband for the property; and that, on January 26, 1885, the plaintiff's husband borrowed of the defendant $105, and gave to the defendant his negotiable note for said sum, payable in two months, secured by a mortgage covering the property in suit, which mortgage was duly recorded.

On April 16, 1885, the plaintiff's husband, not having paid any part of the January loan, except the interest thereon, borrowed $100 more from the defendant, and gave to the defendant his negotiable note for $200, covering the January loan and the new loan, payable in one month from its date, secured by another mortgage, in the same form, and covering the same property, and this mortgage was also duly recorded. At the same time the defendant surrendered to the plaintiff's husband the January mortgage and note.

On September 13, 1885, the plaintiff's husband died, and the defendant, on September 26, 1885, took possession of the property in suit for the purpose of foreclosing the April mortgage, which had not been paid in any part, except the interest.

The defendant introduced evidence tending to prove that the plaintiff was present and heard the defendant and her husband making the arrangements for the defendant to lend her husband the $105, on January 26, 1885; that she knew such loan was to be made on the security of a mortgage by her husband on the property which she herself claimed to own; that she neglected to inform the defendant of her claim to the property; and that the defendant did not know of her claim to the property until after the husband's death. Upon this matter the evidence was conflicting.

The defendant requested the judge to instruct the jury that such conduct on the part of the plaintiff would estop her from claiming the property, as against the defendant, until the January loan of $105 was repaid to the defendant.

The judge declined to instruct the jury as requested by the defendant, but instructed them that such conduct would create an estoppel on the plaintiff as to the January mortgage, but that such estoppel would not extend to the April mortgage, if the April mortgage and note were given in payment of the January

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mortgage and note; that the estoppel would not continue, if the January mortgage and note were in fact paid, and the mortgage cancelled or surrendered for the purpose of relinquishing all claim under the same; that the giving of the April mortgage and note was *prima facie* payment of the January mortgage and note; that if the January mortgage and note were given back by the defendant to the plaintiff's husband for the purpose between them of surrendering them, that is, of giving up all claim under them, then the estoppel would not continue, but that it would continue if they were given back with an agreement that the January mortgage and note should stand, that is, that the April mortgage and note should not be considered a payment and discharge of the January mortgage and note; that if the April mortgage and note were taken in payment of the January mortgage and note, then, the January mortgage and note having been paid, the plaintiff would not be estopped by what took place in January to set up her title as against the April mortgage.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

P. Keyes, for the defendant.

H. N. Allin, for the plaintiff.

KNOWLTON, J. The plaintiff, by her silence on January 26, 1885, was estopped from claiming her property as against the mortgage which the defendant then took. The intention by one's conduct to induce another to change his situation, which is said in many of the cases to lie at the foundation of the doctrine of estoppel *in pais*, is commonly inferred from the conduct itself. It is sometimes even conclusively presumed from it, or rather, the actor is held to be bound by the inference of his intention legitimately drawn from his acts by the party with whom he is dealing. If his conduct is in fact acted upon by another, and is of such a kind that a reasonable man would rely on it, and would believe that he meant it as an inducement to be acted upon, he is bound by it. And this is often true of conduct by negligence or omission, where for any cause it is the duty of a person to disclose the truth. The plaintiff's failure to declare her ownership, when she was present and knew that the defendant was lending his money on the supposed security of

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her husband's mortgage of her chattels, was equivalent to consent to the conveyance, and an agreement not to set up her title against it. *Fall River Bank* v. *Buffinton*, 97 Mass. 498. *Fowler* v. *Parsons*, 143 Mass. 401. *Freeman* v. *Cooke*, 2 Exch. 654. *In re Bahia & San Francisco Railway*, L. R. 3 Q. B. 584.

But the law does not regard estoppels with favor, nor extend them beyond the requirements of the transactions in which they originate. The plaintiff was estopped from denying the validity of the transaction into which, with her knowledge, the defendant was induced to enter by her conduct. The arrangement then made gave him security for the note then given. She was not estopped from claiming her property as against a new mortgage which might subsequently be made, nor from availing herself of a release of the mortgage, or a payment of the note, even though such payment would not have been accepted in the form in which it was made, if the mortgagee had known that the mortgagor could not give a good title by a new mortgage. Her silence cannot, upon any correct principle, be held to affect her in connection with transactions which did not directly result from it. She cannot be deemed to have contemplated the making of a mortgage in April, 1885, nor the payment of the original mortgage note by a new one. If the defendant suffered from mistaken confidence in his new security, it was a misfortune for which she is not legally responsible.

The jury were rightly instructed "that the giving of the April mortgage and note was *prima facie* payment of the January mortgage and note," which were surrendered at the same time; and, under all the instructions, they must have found that, when the defendant surrendered the papers, he intended to give up his claim under them. *Taft* v. *Boyd*, 13 Allen, 84. *Dodge* v. *Emerson*, 131 Mass. 467. *Exceptions overruled.*

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EDMUND J. FREEMAN *vs.* LEWIS T. FOSS.

Suffolk. November 15. — 23, 1887. DEVENS & W. ALLEN, JJ., absent.

A. agreed orally to work for B. for two years, receiving as his compensation instruction in B.'s business, and certain tuition at the end of that time by a third person, to be paid for by B. Before the expiration of the two years, A. was unwilling to remain longer under the contract, and asked that a certain sum be paid him by B. for his services thereafter. This was agreed to. *Held*, that the original agreement was within the statute of frauds, Pub Sts. c. 78, § 1, *cl.* 5, and could not be set up in defence to an action brought against B. by A., on a *quantum meruit*, for services rendered under it.

CONTRACT, on an account annexed, for work and labor of the plaintiff's minor son, from March 31, 1884, to March 18, 1885, and from October 5, 1885, to January 4, 1886, at $3 a week, amounting in all to $189. Writ dated May 29, 1886. Answer: 1. A general denial. 2. That, on or about March 31, 1884, the defendant entered into an agreement with the son, with the full knowledge of the father, by the terms of which the defendant, a dentist, agreed to take the son into his office, furnish him with books for his use and study, and, if the son remained with the defendant two years, to pay his tuition fees at the Boston Dental College; that the son, in consideration thereof, agreed to remain with the defendant for two years, devote his time to his studies and the business of the defendant, and accept the compensation above set forth for such services as he should render the defendant; that the son remained with the defendant until March 18, 1885, when he left and remained away until October 5, 1885, when he returned, and resumed his studies and services until January 4, 1886, when he declined to proceed further under the existing contract; whereupon the defendant annulled the agreement, with the full consent of the plaintiff, and made a new one. The answer further alleged performance on the part of the defendant of the terms of both agreements.

Trial in the Superior Court, without a jury, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff agreed that his son should go to work for two years in the office of the defendant, who is a dentist of many

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years' experience in Boston, and should there receive instruction in the business and profession of dentistry. The defendant thereupon agreed to take him into his office, instruct him, and furnish him with books and the use of tools, stipulating that the plaintiff's son should so remain in his office, working and gaining instruction for the space of two years, when he would pay to the authorities of the Boston Dental College the tuition fees of the plaintiff's son in that institution; all of which was agreed upon by both parties. On March 31, 1884, the plaintiff's son went into the office of the defendant under said agreement, and remained there until March 18, 1885, when, by reason of illness, he left and remained away until October 5, 1885; he then returned and remained until January 4, 1886, when he expressed his unwillingness and inability to remain, and declined to remain longer under the original agreement, but requested that he should be paid the sum of three dollars per week thereafter. This was agreed to, and thereafter for some weeks that sum was paid to him. None of the agreements were in writing.

The plaintiff contended that, by the statute of frauds, the contract set up in the answer could not be used in evidence in defence to this action. The judge permitted the evidence to be heard; but ruled that the plaintiff could maintain his action upon a *quantum meruit*, notwithstanding said contract, and that, by reason of the statute of frauds, the defendant could not set up the contract in defence to this action. The defendant asked the judge to rule that, upon the facts proved, the contract was executed on both sides up to the time of the new agreement to pay three dollars per week for services, January 4, 1886; and that an action on a *quantum meruit* could not be maintained when the plaintiff had received from the defendant, on January 4, 1886, all the considerations due and payable at that time under the original contract for services theretofore performed. The judge refused so to rule; and found for the plaintiff for the full amount claimed. The defendant alleged exceptions.

C. W. Bartlett, for the defendant.

C. P. Weston, for the plaintiff.

KNOWLTON, J. The defendant seeks to avoid liability for services of the plaintiff's son, by showing that they were rendered under an express contract, and that he did all that he

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agreed to do so long as the boy remained in his service. The contract which he sets up was within the statute of frauds; it was entire and indivisible, and was not fully performed by either party. A large part of the consideration for the plaintiff's agreement was not payable by the defendant until after the end of the term of service, and no part of it was applicable to any particular portion of the term. As the plaintiff could not have enforced this contract against the defendant, so the defendant cannot avail himself of it to avoid liability upon a *quantum meruit*. This case cannot be distinguished from *King* v. *Welcome*, 5 Gray, 41. See also *Bernier* v. *Cabot Manuf. Co.* 71 Maine, 506; *Comes* v. *Lamson*, 16 Conn. 246.

Exceptions overruled.

MARGARET COWEN *vs.* MEHITABLE SUNDERLAND.

Norfolk. November 18. — 23, 1887. W. ALLEN, J., absent.

In an action for personal injuries occasioned to the plaintiff by falling into a cesspool upon premises owned by the defendant, and occupied by the plaintiff as a tenant at will, there was evidence that the plaintiff did not know of the existence or location of the cesspool; that it was in the yard she had hired and was entitled to use; that it was covered with boards, over which were from four to six inches of earth on which grass and weeds were growing; that it presented the same appearance as the rest of the yard; that it had never been pointed out to her; that it was where she passed over it in her use of the yard; that the boards which covered it were rotten and decayed; that, in stepping upon this covering of the cesspool, she sank into it and was injured; that this cover had been repaired with old boards some time before by the defendant's direction; and that the defendant was present when this was done. *Held*, that this evidence should have been submitted to the jury.

TORT for personal injuries occasioned to the plaintiff by falling into a cesspool upon premises owned by the defendant, and occupied by the plaintiff as a tenant at will. Trial in the Superior Court, before *Hammond*, J., who ruled, as requested by the defendant, that there was no evidence which would authorize a verdict for the plaintiff; directed a verdict for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. If the ruling and direction were

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wrong, the verdict was to be set aside; otherwise, judgment to be entered on the verdict. The facts appear in the opinion.

J. E. Cotter & C. F. Jenney, for the plaintiff.

C. P. Gorely & A. L. Bartlett, for the defendant.

DEVENS, J. It is a general rule, well established by the decisions of this court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor, or of deceit. If, therefore, he is injured by reason of the unsafe condition of the premises hired, he cannot ordinarily maintain an action, in the absence of such warranty or of misrepresentation. The rule of *caveat emptor* applies, and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe, and adapted to the purposes for which they are hired.

There is an exception to this general rule, arising from the duty which the lessor owes the lessee. This duty does not spring directly from the contract, but from the relation of the parties, and is imposed by law. When there are concealed defects, attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor, if injury occurs. The principle, that one who delivers an article which he knows to be dangerous to another ignorant of its qualities, without notice of its nature or qualities, is liable for any injury reasonably likely to result, and which does result, has been applied to the letting of tenements. It has thus been held that, where one let premises infected with the small-pox, and injury occurred thereby, he was liable, if, knowing this danger, he omitted to inform the lessee. *Minor* v. *Sharon*, 112 Mass. 477. This case proceeded upon the ground of the lessor's negligent failure to perform a duty which he owed the lessee; and it was not deemed important whether the omission to give the information was intentional or otherwise. See also *Bowe* v. *Hunking*, 135 Mass. 380, and cases cited; *Tuttle* v. *Gilbert Manuf. Co.*, *ante*, 169.

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Obviously, there may be many concealed defects and dangers about a house which careful examination will not discover. If these are known to the lessor, it is for him to reveal them. Traps or contrivances may exist by means of which the most careful occupant might be injured. "Such traps or contrivances," says Mr. Justice Field, "are not merely a want of repair; they are, in a sense, active agencies of mischief, which no tenant would expect to find in even a decayed and ruinous tenement." *Bowe* v. *Hunking*, *ubi supra*.

In *Reichenbacher* v. *Pahmeyer*, 8 Bradw. 217, the defect alleged was in the manner of hanging a chandelier. The chandelier was hung unsafely, and the lessor knew it, and did not disclose this fact to the lessee. It was not apparent to an observer. It was held that the lessor was liable to a servant of the lessee who was injured by its fall. See also *Scott* v. *Simons*, 54 N. H. 426; *Godley* v. *Hagerty*, 20 Penn. St. 387.

In *Bowe* v. *Hunking*, it was held that the case then at bar was not within the exception to the general rule, by which a lessor is rendered liable for negligence of this character. There was no evidence that the defective step by which the injury in that case occurred was known to the lessor or her agent to be unsafe; and, further, this defect itself was obvious, and whatever danger existed was readily seen by examination.

In the case at bar, as the plaintiff presented it, there was evidence that she did not know of the existence or location of the cesspool; that it was in the yard she had hired and was entitled to use; that it was covered with from four to six inches of earth on which grass and weeds were growing; that it presented the same appearance as the rest of the yard; that it had never been pointed out to her; that it was where she passed over it in her use of the yard; that the boards which covered it, and on which the earth rested, were rotten and decayed; and that, in stepping upon this covering of the cesspool, she sank into it and was injured. There was further evidence that this cover had been repaired with old boards some time before, by the defendant's direction; and that the defendant was present when this was done. From the testimony of the witnesses of these repairs, the jury might fairly have inferred that it was left in an unsafe state, and known to be so.

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Upon these facts, the learned judge erred in withdrawing the case from the jury. It should have been submitted, with proper instructions, to determine whether the defendant knew the defective covering of the cesspool and the danger therefrom, and had negligently omitted to inform the plaintiff, and whether the plaintiff herself, making careful examination, had been injured thereby by reason of a want of proper information.

Verdict set aside.

TAUNTON NATIONAL BANK *vs.* NAHUM STETSON & others.

Plymouth. Oct. 18. — Nov. 25, 1887. C. ALLEN & KNOWLTON, JJ., absent.

The Pub. Sts. *c.* 157, § 112, authorize proceedings in insolvency against a debtor whose real estate has been attached on mesne process in an action of contract for the sum of $100 or upwards, founded on a demand in its nature provable against the estate of an insolvent debtor, if the defendant does not before the return day of the writ dissolve the attachment, although it appears from the return of the officer that the attachment was a general one, if the defendant then had in fact a record title to real estate in the county in which the attachment was made.

A., the maker of a promissory note indorsed by B., assigned all his property to trustees for the benefit of his creditors, by an indenture, which was also executed by C., the holder of the note, and by other creditors. The indenture provided that a holder of any promissory note to which A. was a party, and upon which any other person was absolutely or contingently liable, did not, by signing the indenture, release or discharge such other person, or in any manner impair his liability thereon; but every such holder fully reserved all rights and remedies thereon, and the same might be as fully enforced as if the indenture had not been executed. *Held*, on a petition by C. against B., under the Pub. Sts. *c.* 157, § 112, to have B. adjudged insolvent, and a warrant issue against his estate, that C. was a creditor of B., within the statute, and that evidence offered by B., that the property received by the trustees of A. was more than enough to pay all A.'s liabilities, was immaterial.

It is not necessary or proper that the judge of insolvency should be made a party to an appeal from his decision dismissing a petition to have a person adjudged insolvent and a warrant issue against his estate.

After a petition to the Court of Insolvency, to have a person adjudged insolvent and a warrant issue against his estate, has been dismissed, it is not necessary that the petitioner should apply to that court for a further hearing before bringing his petition to this court, under the Pub. Sts. *c.* 157, § 15.

APPEAL from a decision of the Court of Insolvency, dismissing a petition to have the respondent Stetson adjudged insolvent,

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and a warrant issue against his estate. Hearing before *C. Allen*, J., who ordered the warrant to issue, and reported the case for the consideration of the full court; such decree to be entered as justice might require. The facts appear in the opinion.

H. Kingman, for Stetson.

H. J. Fuller, (*J. M. Morton* with him,) for the petitioner.

MORTON, C. J. Under the Pub. Sts. *c.* 157, § 15, this court has jurisdiction, upon the bill or petition of any party aggrieved, to revise and correct the decisions of a court of insolvency, either in matters of law or of fact, except where special provision is otherwise made. *Lancaster* v. *Choate*, 5 Allen, 530. The question in the case before us is, therefore, whether, upon the facts shown in this court, a warrant should issue against the estate of the respondent Stetson.

The insolvency law provides that, if a person whose goods or estate are attached upon mesne process in a civil action for the sum of one hundred dollars or upwards, founded upon a demand in its nature provable against the estate of an insolvent debtor, has not, before the return day of such process, dissolved the attachment in the manner provided by law, any of his creditors whose claims provable against his estate amount to one hundred dollars, may apply by petition to have his estate seized and distributed under the insolvent law; and, if the facts set forth in the petition appear to be true, a warrant is to issue against the estate of the debtor. Pub. Sts. *c.* 157, §§ 112–114.

In the case before us, it appears from the return of the officer making the attachment, that, on August 16, 1886, a general attachment of all the right, title, and interest which the respondent had in any real estate in the county of Plymouth was made in an action by a creditor upon a debt of more than one hundred dollars, which was in its nature provable against the estate of an insolvent debtor, and that such attachment has never been dissolved. It appears in evidence that, at the time the attachment was made, the respondent had "the record title of certain real estate in said county of Plymouth." It is the settled law of this Commonwealth, that such a general attachment is valid, and is effectual to bind any real estate in the county, of which the record title is in the debtor. *Taylor* v. *Mixter*, 11

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Pick. 341. *Pratt* v. *Wheeler*, 6 Gray, 520. *Woodward* v. *Sartwell*, 129 Mass. 210.

The respondent relies upon *Dennis* v. *Sayles*, 11 Met. 238. There are some expressions in the opinion, which, if taken apart from their context, and regarded as intended as statements of general principles, would support the respondent's claim. But in that case the return of the officer was that he had attached the right, title, and interest of the debtor to any real estate in the county, and there was no evidence that the debtor had any real estate which was subject to attachment; and the decision was that such return was not conclusive evidence of an actual attachment.

In the case at bar, as we have seen, the return of the officer was supplemented by proof that the debtor had real estate in the county of Plymouth upon which the attachment operated.

We come next to the question whether the petitioner is a creditor entitled to maintain this petition. It is the holder of three promissory notes, each for the sum of $10,000, and each signed by the Bridgewater Iron Company, payable to the respondent, and by him indorsed to the petitioner. Each of said notes was duly protested at maturity, and due notice given to the respondent. *Prima facie* this was a debt provable against the respondent as an insolvent debtor. But the respondent put in evidence an indenture by which the Bridgewater Iron Company assigned all its property to trustees, for the benefit of its creditors, which indenture was executed by the petitioner and by other creditors. This indenture contains the following provision: "And it is further expressly provided and agreed, that no holder of any promissory note, draft, bill of exchange, check, or other debt to which the said Bridgewater Iron Company is a party, whether as drawer, indorser, guarantor, surety, maker, joint maker, or otherwise, and upon which any other person, firm, or corporation is absolutely or contingently liable, whether as drawer, indorser, guarantor, surety, maker, joint maker, or otherwise, does, by signing or executing these presents, release or discharge such other person, firm, or corporation therefrom, or in any manner impair his or their liability thereon, but, on the contrary, every such holder hereby fully reserves all rights and remedies thereon against any and all such persons, firms, or

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corporations, and the same may be as fully enforced as if these presents had not been executed."

We need not consider what would have been the effect of the indenture if it had not contained this provision. By this clause, the petitioner, in the clearest manner, fully reserved all rights and remedies which it had against the respondent as indorser of notes signed by the Bridgewater Iron Company. It would clearly have a right to maintain an action at law on the note against the respondent as indorser, and it is equally clear that it could prove the debt in insolvency proceedings against the respondent. *Tobey* v. *Ellis*, 114 Mass. 120. *Dickinson* v. *Metacomet Bank*, 130 Mass. 132. The assignment to trustees did not pay or extinguish the petitioner's debt against the principal debtor, the maker of the note. To hold thus would nullify the careful provision which we have cited above. It reserved its rights against the indorser, and these rights would continue until the notes are paid, either by the maker, trustees, or indorser. Therefore the evidence offered by the respondent to prove that the property received by the trustees is more than sufficient to pay all the creditors of the Bridgewater Iron Company was properly rejected. If the fact be true, it could not take away the right which the petitioner has to proceed by any appropriate remedy against one who is liable as indorser or otherwise upon the notes of the Bridgewater Iron Company. It follows that the petitioner is a creditor who had the right to apply for a warrant, *in invitum*, against the respondent, under the statute.

The two questions we have considered are the only substantial questions raised by the report. It is not necessary or proper that the judge of insolvency should be made a party to these proceedings. *Winchester* v. *Thayer*, 129 Mass. 129.

The claim of the respondent that the petitioner, after his petition was dismissed by the Court of Insolvency, should have applied to that court for a further hearing before bringing his petition or bill in this court, cannot be sustained. We know of no law which requires such application or further hearing.

It follows, that the order of the judge of insolvency dismissing the petition should be reversed, and an order should be made directing the judge of insolvency to issue a warrant upon the petition. *Decree accordingly.*

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M. B. SLOCUM *vs.* JOHN C. RILEY.

Bristol. Oct. 25. — Nov. 25, 1887. C. ALLEN & KNOWLTON, JJ., absent.

The operation of the statute of limitations upon a promissory note is not, under the Pub. Sts. *c.* 197, § 11, suspended by the temporary absence of the maker from the State, but only by absence of such a character as works a change of his domicil.

In an action against an officer for negligently suffering the escape of a person whom he had arrested upon a writ sued out by the plaintiff, the latter is not entitled to recover, as the measure of damages, the amount of his debt against the escaped person, but only such damages as he proves that he has actually sustained.

In an action against an officer for negligently suffering the escape of a person whom he had arrested upon a writ sued out by the plaintiff, the burden of proof is upon the plaintiff to show that he had a valuable debt against the escaped person, which he has lost by the act of the officer; and this burden is not sustained by showing that he holds a promissory note signed by such person, which, on its face, was at the time of the escape barred by the statute of limitations.

In an action against an officer for negligently suffering the escape of a person whom he had arrested upon a writ sued out by the plaintiff, if the defendant relies, in mitigation of damages, upon the fact that the plaintiff's debt against the escaped person is barred by the statute of limitations, he is not required to set up such defence in his answer.

MORTON, C. J. This is an action against an officer for negligently suffering the escape of one Maynard, whom he had arrested upon a writ sued out by the plaintiff. At the trial, the defendant admitted his liability; and the only question presented to us is as to the correctness of the ruling of the court upon the subject of damages. The plaintiff contended that he was entitled to recover the amount of his debt against Maynard. It appeared that the plaintiff's writ against Maynard was dated on August 20, 1881. In order to prove the debt of Maynard the plaintiff produced a note signed by Maynard, and described in the writ against him as being of the following tenor: "Fall River, March 21, 1874. Four months after date, I promise to pay to the order of M. Bradford Slocum forty-one $\frac{7}{100}$ dollars, value received." Upon the face of the note, it was barred by the statute of limitations, more than six years having elapsed from its maturity to the date of the writ against Maynard. Pub. Sts. *c.* 197, § 1. The plaintiff then attempted to show that the

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running of the statute of limitations had been suspended by the absence of the maker from the State. Pub. Sts. *c.* 197, § 11. But, in computing the period of limitation, the time of a debtor's absence from the State is not to be excluded, unless it is of such a character as to work a change of his domicil. *Collester* v. *Hailey*, 6 Gray, 517. *Langdon* v. *Doud*, 6 Allen, 423. The evidence offered by the plaintiff at most proved a temporary absence of Maynard, and was insufficient to show that he had changed his domicil from this State to another.

In this state of the case, the Superior Court ruled that the plaintiff was not entitled to recover the face of the note, with interest; and we are of opinion that the ruling was correct. In an action like this, the plaintiff can recover such damages as he proves he has actually sustained by the wrongful act of the officer. *Chase* v. *Keyes*, 2 Gray, 214. If he shows that the officer has permitted an escape, he is entitled to nominal damages; but beyond this he can recover no damages except what he proves he has actually sustained. The debt against the escaped debtor is not the measure of damages, but the loss in fact sustained. Accordingly, it has been repeatedly held that the officer might show in mitigation of damages that the debtor was poor and unable to pay the debt. *Weld* v. *Bartlett*, 10 Mass. 470. *Brooks* v. *Hoyt*, 6 Pick. 468. *Woods* v. *Varnum*, 21 Pick. 165.

Upon the issue whether the right of action was barred by the statute of limitations, the burden of proof was not upon the defendant. On the contrary, it is settled that where the statute of limitations is set up in bar, the burden of proof is on the plaintiff to show both a cause of action and the suing out of process within the period of limitation. *Pond* v. *Gibson*, 5 Allen, 19, and cased cited. *Corliss Steam Engine Co.* v. *Schumacher*, 109 Mass. 416. Inasmuch as the note on its face appears to have matured more than six years before suing out process against the maker, if the plaintiff relies upon the absence of the maker from the State as bringing the case within the exception of the statute, the burden is upon him to prove that the absence was of such a character that the time of his absence is to be deducted in computing the period of limitation. As we have before intimated, there is not sufficient evidence to justify the jury in finding this to be so.

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In the case at bar, therefore, the burden being upon the plaintiff to prove that he had a valuable debt against Maynard, which he has lost by the misconduct of the defendant, he shows merely that he holds a note signed by Maynard which is barred by the statute of limitations. This does not meet and sustain the burden. It is no answer to say that the defence of the statute of limitations is in the nature of a personal privilege, and that possibly Maynard might not avail himself of it. To hold that the jury might, on this ground, find that the note was of value, would be to allow them to supply by the merest conjecture a vital deficiency in the plaintiff's proofs. Indeed, the only evidence upon this point is that Maynard did object to the plaintiff's suit against him, on the ground that the debt sued was barred by the statute of limitations, and it was for this reason that the defendant released him from arrest. For these reasons, we are of opinion that the facts and evidence in the case would not warrant the jury in including in their verdict damages for the loss of said note and interest; and that the court rightly so ruled.

The plaintiff contends that the issue of the statute of limitations was not open to the defendant, because not raised in his answer. He was not required to plead it. Under our Practice Act, it is necessary to set forth in the answer each substantive fact intended to be relied upon in avoidance of the action. Pub. Sts. *c.* 167, § 20. But in this case the fact that the note was barred by the statute of limitations is not a fact in avoidance of the action. It is available only in mitigation of damages. It only goes to show that the plaintiff has not lost a valuable debt, and thus to reduce the damages. *Exceptions overruled.*

J. M. Wood, for the plaintiff.

H. K. Braley, for the defendant.

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COMMONWEALTH *vs.* JAMES BOYLE.

Middlesex. November 21. — 25, 1887. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, there was evidence tending to show that the tenement in question was visited within the time alleged, and the defendant was found behind a bar, where cigars and hop beer containing less than three per cent of alcohol were kept; that samples of dirty water were taken from a tank under the bar near where the defendant stood, and from the bottom of an ice-chest, which samples, on analysis, were found to contain more than three per cent of alcohol; that on each visit the defendant was seen to go to the tank and go through the motion of rinsing a two-quart can, which was kept under the bar; that an empty can was found in the ice-chest which smelt of whiskey; and that the sample of the water taken from the bottom of the ice-chest also smelt of whiskey. *Held*, that the evidence was competent; and that it was sufficient to warrant a verdict of guilty.

COMPLAINT for keeping and maintaining a common nuisance, to wit, a shop, in Malden, used for the illegal sale and illegal keeping of intoxicating liquors, on September 10, 1886, and on divers other days and times between that day and September 25, 1886. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows:

There was evidence tending to show the following facts: Two police officers visited the shop in question within the time alleged, and found the defendant behind the bar, where cigars and hop beer containing less than three per cent of alcohol were kept. The officers took samples of dirty water, one from a tank under the bar near which the defendant stood, and the other from the bottom of an ice-chest. These samples were sealed up in two bottles, one of which one of the officers subsequently left in the office of the State Assayer, one Sharples, in Boston, and when he left it there he did not see the assayer. On each occasion when the officers visited the shop, as above stated, they saw the defendant go to said tank and go through the motion of rinsing a two-quart can, which was also kept under said bar. On one occasion when they visited the shop, they found in the ice-chest an empty can which smelt of whiskey, and a sample of the water taken from the bottom of the ice-chest also smelt of whiskey.

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Sharples testified, for the government, that he analyzed the contents of the two bottles, and that they contained more than three per cent of alcohol. The bottles or contents were not produced, nor was any certificate of analysis produced.

The defendant asked the judge to instruct the jury, "that there must be proved a sale or some act of keeping or offering for sale in said shop by the defendant; and that the jury must be satisfied that what liquor was found and analyzed was a beverage, to be used as such."

The judge refused so to rule, but instructed the jury, in addition to other instructions to which the defendant did not except, that there was competent evidence in the case tending to prove that the defendant was guilty; and that the defendant should be convicted, if, upon all the evidence in the case, they were satisfied, beyond a reasonable doubt, that the defendant used his shop, within the time named in the complaint, for the illegal sale of intoxicating liquor.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

A. V. Lynde & W. P. Harding, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

By the Court. It was not necessary for the government to prove an act of sale or offering for sale. It was required to prove that the defendant kept the premises, and used them for the illegal sale or illegal keeping of intoxicating liquors; but this burden of proof may be met by other evidence than that of specific sales. The instructions given at the trial were sufficient and appropriate. The evidence excepted to was clearly competent. *Exceptions overruled.*

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COMMONWEALTH *vs.* FREDERICK H. BISCH.

Middlesex. November 22. — 25, 1887. DEVENS & W. ALLEN, JJ., absent.

The copy of the record of a trial justice in a criminal case, transmitted to the Superior Court, recited that the defendant was adjudged guilty, and appealed to the term of the Superior Court next to be held for the county, and was ordered to recognize to appear and prosecute his appeal. It did not state that the defendant recognized, but it was accompanied by a copy of the recognizance entered into by the defendant. *Held*, that it sufficiently appeared that the appeal was perfected by a recognizance; and that the Superior Court had jurisdiction of the case.

Under the Pub. Sts. c. 155, § 58, providing for an appeal from the sentence of a trial justice to the Superior Court, and that the appellant shall be committed "until he recognizes to the Commonwealth in such reasonable sum and with such sureties as the justice requires," the magistrate has the right in his discretion to accept as sufficient a recognizance with one surety.

The copy of the record of a trial justice in a criminal case, transmitted to the Superior Court, recited that the defendant was adjudged guilty and sentenced on November 22, 1886, from which sentence he appealed to the Superior Court next to be held at C. in and for said county, on the second Monday of February, 1886. *Held*, that the error in the second date furnished no ground for quashing the complaint or for an arrest of judgment.

COMPLAINT to a trial justice, for keeping and maintaining a certain common nuisance, to wit, a tenement in Natick, used for the illegal sale and illegal keeping for sale of intoxicating liquors, on October 1, 1886, and on divers other days and times between that day and November 20, 1886.

The record showed that the defendant was arrested and brought before the trial justice, and pleaded not guilty; that he was adjudged guilty and sentenced on November 22, 1886; from which sentence he appealed "to the Superior Court next to be held at Cambridge in and for said county, on the second Monday of February, A. D. 1886," and was ordered to recognize to appear and prosecute his appeal. A copy of the recognizance, entered into by the defendant with one surety, accompanied the copy of the record transmitted by the trial justice to the Superior Court.

In the Superior Court, on appeal, before the jury were empanelled, the defendant moved to quash the complaint, for the following reason: "The complaint is not lawfully before this

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court, no recognizance, as required by statute, having been given before the magistrate upon the alleged appeal; and this court has no jurisdiction of the complaint nor of the defendant."

Bacon, J., overruled this motion; and, at the trial, the jury returned a verdict of guilty.

The defendant, after verdict and before judgment, moved that judgment be arrested, for the following reasons: "1. Because the recognizance and the copy of the record transmitted are inconsistent and contradictory. 2. Because it does not appear from the record whether the defendant recognized as ordered, or was ordered to be committed, &c. 3. Because it does not appear that this court had any jurisdiction in the premises."

This motion was overruled; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

MORTON, C. J. The motion to quash and the motion in arrest of judgment were properly overruled. There are no such errors in the record of the magistrate as show that the Superior Court had not jurisdiction of the case. The record shows that the defendant, being convicted, appealed to the term of the Superior Court next to be held for the county, and was ordered to recognize. It does not formally state that the defendant recognized, but the magistrate transmitted to the Superior Court a copy of his record, accompanied by the recognizance actually entered into by the defendant. This sufficiently shows that the appeal was perfected by a recognizance, and that the Superior Court had jurisdiction. Under the Pub. Sts. c. 155, § 58, the magistrate has the right in his discretion to accept as sufficient a recognizance with one surety.

The defendant was sentenced on November 22, 1886; the record recites that he appealed "to the Superior Court next to be held at Cambridge in and for said county, on the second Monday of February, A. D. 1886." The date 1886 is clearly a mere clerical error. Taking the whole record, it is plain it was intended to be "1887." The first part of the sentence shows this. The error misleads no one, and furnishes no ground for quashing the complaint or arresting judgment.

Exceptions overruled.

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COMMONWEALTH *vs.* MORTIMER DOWNEY.

Middlesex. November 22. — 25, 1887. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint for keeping intoxicating liquors at S., with intent unlawfully to sell the same, if it appears that the defendant's premises are situated partly in S. and partly in C., an adjoining city, evidence that intoxicating liquors were found by an officer, who searched the premises, in that part situated in C., is admissible upon the question of the intent with which the defendant kept liquors in that part of the premises situated in S.

COMPLAINT for keeping, at Somerville, intoxicating liquor with intent unlawfully to sell the same in this Commonwealth. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, in substance as follows:

One Johnson, a Somerville police officer, testified that on May 25, 1887, with a search-warrant issued by the Somerville Police Court, he went to the premises of the defendant, which were located in a building on the line between Somerville and Cambridge, so that a part of the tenement was in Somerville and a part in Cambridge; that, together with a police officer of Cambridge, who also had a search-warrant, he entered that portion of the premises of the defendant which were occupied by him as grocery, and which was on the Cambridge side of the line; and that he found hop beer on draught in the shop, and also a bottle and a flask, each containing a teaspoonful of whiskey, behind the counter. The defendant objected to the testimony of the officer as to what was found in the shop in Cambridge, on the ground that the complaint alleged a keeping at Somerville. The judge overruled the objection, and admitted the evidence, but only as bearing upon the question of intent as to the keeping of the liquor found in Somerville. The officer then testified to finding a jug containing whiskey, in the third story, in that part of the building which was in Somerville, and upon the premises of one White. The officer seized and carried away this as the property of the defendant. It was claimed as the property of White.

Testimony was further introduced that a large number of people were seen on Sunday, May 22, to enter the building, and

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that Mrs. Downey and a girl were seen to go from the lower part of the building, which was occupied by the defendant, up stairs with a pitcher.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

G. F. Piper, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

By the Court. For the purpose of showing that the intoxicating liquor found in that part of the defendant's premises situated in Somerville was kept with intent to sell, the evidence admitted as to what was found in that part of the building situated in Cambridge was competent.

Upon this issue, it was proper that the jury should know the situation and use of the whole building, it being immaterial whether the liquor found in Somerville was intended for sale in that city, or in the part of the building which was in Cambridge. *Commonwealth* v. *McCluskey*, 123 Mass. 401.

Exceptions overruled.

Commonwealth *vs.* Philip McParland.

Norfolk. November 22. — 25, 1887. Devens & W. Allen, JJ., absent.

It is no ground for an arrest of judgment in a criminal case, that the copy of the record transmitted to the Superior Court by the trial justice who tried the case is attested by him as "justice" only.

Complaint to a trial justice, for keeping intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth.

The record showed that the defendant was arrested and brought before the trial justice, and pleaded not guilty; that he was adjudged guilty, and sentenced; and that he appealed from said sentence to the Superior Court. The copy of the record transmitted to that court was attested by the trial justice who tried the case as "justice."

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In the Superior Court the defendant, after verdict and before judgment, moved in arrest of judgment, "because the trial justice has not transmitted to this court a true and attested copy of the record, and because the court has no jurisdiction."

This motion was overruled; and the defendant appealed to this court.

J. L. Eldridge, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

BY THE COURT. The copy of the record transmitted to the Superior Court is sufficiently attested. It is attested by the trial justice who tried the case; and the fact that, in the attestation, he describes himself as "justice," instead of "trial justice," is immaterial. *Judgment on the verdict.*

EUGENE TOMPKINS *vs.* NOBLE H. HILL.

Suffolk. Nov. 14. — Dec. 5, 1887. DEVENS & W. ALLEN, JJ., absent.

A. had a claim against B. for one third of the net profits of an enterprise in which they were jointly engaged. He sent a letter, requesting B. to render an account. B., in reply, sent a letter, enclosing an account, in which he credited A. with one third of the profits, and charged him with a certain sum, claimed to be due for B.'s services, and also enclosing a check for the balance of the account thus stated. A. credited the check to B. on account, and forthwith demanded of B. payment of the sum so charged to him by B.; and, upon B.'s refusal to pay, brought an action against him. *Held*, that the facts did not show an accord and satisfaction; and that the action could be maintained.

CONTRACT, in three counts. The first count was for money had and received to the plaintiff's use. The second count was for a balance due under an oral agreement. The third count was for a balance found due on an accounting together. Answer: 1. A general denial. 2. Accord and satisfaction. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

C. H. Sprague, for the defendant.

L. L. Scaife, for the plaintiff, was not called upon.

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MORTON, C. J. If a creditor, having an unliquidated or disputed claim against his debtor, accepts a sum smaller than the amount claimed in satisfaction of the claim, he cannot afterwards maintain an action for the unpaid balance of his original claim. *Tuttle* v. *Tuttle*, 12 Met. 551. *Donohue* v. *Woodbury*, 6 Cush. 148. This proceeds upon the ground that the parties have agreed to settle an unliquidated or disputed claim, or, in other words, have agreed to an accord and satisfaction of such claim.

In the case before us, the facts agreed do not show any such accord and satisfaction. The plaintiff had a claim against the defendant for one third of the net profits of an enterprise in which they were jointly engaged. He sent a letter requesting the defendant to render an account. The defendant, in reply, sent a letter enclosing an account, in which he credited the plaintiff with one third of the profits, and charged him with an item of $260, claimed to be due for the defendant's services, and also enclosing a check for the balance of the account thus stated. The plaintiff credited the check to the defendant on account, but he did not agree to accept it in satisfaction of his claim. On the contrary, he forthwith demanded payment of the said amount of $260 of the defendant, and, upon his refusal to pay, at once brought this suit. The case stands, in legal effect, the same as if the defendant had presented his account and check in a personal interview, and the plaintiff had refused to agree to the account, or to accept the check in full satisfaction. It shows no agreement to compromise, and no accord and satisfaction; and the plaintiff is entitled to recover the balance due him.

Judgment affirmed.

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COMMONWEALTH *vs.* EDWARD INGERSOLL.

Essex. Nov. 1, 1887. — Jan. 2, 1888. DEVENS & KNOWLTON, JJ., absent.

The record of a police court, to which a complaint was made, recited that the defendant, "being asked whether he is guilty or not of the offence within charged upon him, pleads *nolo contendere*, but, after hearing divers witnesses duly sworn to testify the whole truth, and fully understanding the defence of said defendant, it is adjudged by the said court that said defendant is guilty of said offence;" and that the defendant was sentenced, and appealed therefrom to the Superior Court. *Held*, that the record did not sufficiently show that the defendant's plea was accepted by the court, and sentence passed thereupon; and that the defendant had the right to plead anew in the Superior Court, and to have a trial by jury.

COMPLAINT to the Police Court of Gloucester, for keeping intoxicating liquors with intent unlawfully to sell the same in this Commonwealth.

The record recited that the defendant was arrested and brought before said court, and the complaint read to him, "and, being asked whether he is guilty or not of the offence within charged upon him, pleads *nolo contendere*, but, after hearing divers witnesses duly sworn to testify the whole truth, and fully understanding the defence of said defendant, it is adjudged by the said court that said defendant is guilty of said offence;" and that the defendant was sentenced.

From this sentence the defendant appealed to the Superior Court, and at May term, 1886, at the request of the defendant, the complaint was placed upon file.

At January term, 1887, the defendant having been convicted upon another complaint, the district attorney moved for sentence upon the former complaint. Whereupon the defendant claimed the right to plead anew, and filed a motion therefor, upon the following grounds: "1. That it did not appear by the record of said Police Court that the plea of *nolo contendere* was received with the consent of the public prosecutor, or accepted by the Commonwealth, or by the court. 2. That no plea had been entered in said Police Court upon which the defendant could be legally tried."

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Hammond, J., overruled this motion; and ruled that there was nothing for the jury, and that the case was ripe for sentence. The defendant alleged exceptions.

F. L. Evans, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

MORTON, C. J. If the defendant in a criminal case pleads guilty, he cannot afterwards retract his plea and plead anew, except by leave of the court. If, therefore, a defendant pleads guilty in a municipal or police court, and appeals from the sentence to the Superior Court, he cannot of right claim a trial by jury, but is liable to be sentenced upon his original plea in the court below, unless the court gives him leave to plead anew. *Commonwealth* v. *Mahoney*, 115 Mass. 151. A plea of *nolo contendere*, when accepted by the court, is, in its effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt only, and cannot be used against the defendant as an admission in any civil suit for the same act. The judgment of conviction follows upon such a plea, as well as upon a plea of guilty, and such plea, if accepted, cannot be withdrawn, and a plea of not guilty entered, except by leave of court. But there is a difference between the two pleas, in that the defendant cannot plead *nolo contendere* without the leave of the court. If such plea is tendered, the court may accept or decline it in its discretion.

If the plea is accepted, it is not necessary or proper that the court should adjudge the party to be guilty, for that follows as a legal inference from the implied confession, but the court proceeds thereupon to pass the sentence of the law. *Commonwealth* v. *Horton*, 9 Pick. 206.

In *Commonwealth* v. *Adams*, 6 Gray, 359, the complaint was founded upon the St. of 1855, *c.* 215, § 35, which provided that "no admission of the defendant, made in court, shall be received on the trial, without the consent of the prosecutor, except a plea of guilty;" the defendant pleaded *nolo contendere* in the Police Court, but the record did not show that the plea was received with the consent of the prosecutor. This court held that such consent must appear of record, and that, as it did not so appear, judgment entered upon his plea by the Court of Common Pleas, to which the defendant had appealed, was

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erroneous, and that he had the right to plead anew, and to be tried by a jury.

Applying these principles to the case at bar, it follows that, if it appeared by the record of the Police Court, to which the complaint was made, that the defendant's plea of *nolo contendere* was accepted by the court, the Superior Court, upon appeal, could sentence him upon his plea, and decline to permit him to plead anew.

The only difficulty arises from the obscurity of the record of the Police Court. It recites that the defendant, "being asked whether he is guilty or not of the offence within charged upon him, pleads *nolo contendere*, but, after hearing divers witnesses duly sworn to testify the whole truth, and fully understanding the defence of said defendant, it is adjudged by the said court that said defendant is guilty of said offence." This record does not state that the court accepted the plea. The latter part of the record above cited implies that the court did not accept the plea, but proceeded to hear witnesses, and adjudged the defendant to be guilty, as if he had pleaded "not guilty," or had stood mute. If the record had stated that the defendant pleads *nolo contendere*, and thereupon the court passes sentence upon him, it might be held that it showed an accepted plea, although not directly stated to have been accepted, because in such case the action of the court upon the plea would import that it was accepted. But in this case the record implies, not that the court passed sentence upon the plea of *nolo contendere*, but upon an adjudication, after hearing witnesses, that the defendant was guilty. To say the least, the record does not certainly show that the plea was accepted and sentence passed thereupon; and we are of opinion that the defendant had the right to plead anew in the Superior Court, and to have a trial by jury.

Exceptions sustained.

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COMMONWEALTH *vs.* JAMES H. MCCAFFERTY.

Essex. Nov. 4, 1887. — Jan. 2, 1888. DEVENS & KNOWLTON, JJ., absent.

If the charter of a city provides that its by-laws or ordinances shall take effect, and be in force, from and after the time therein respectively limited, without the sanction of any court, or other authority whatever, the provisions of the Pub. Sts. *c.* 27, § 23, and of *c.* 28, § 2, as to publication of by-laws or ordinances, do not apply.

An ordinance of a city, providing that "no person shall place or carry, or cause to be placed or carried, on any sidewalk, any show-board, placard, or sign, for the purpose of there displaying the same," is reasonable and valid.

At the trial of a complaint for a violation of an ordinance of a city, providing that "no person shall place or carry, or cause to be placed or carried, on any sidewalk, any show-board, placard, or sign, for the purpose of there displaying the same," it appeared that the defendant walked upon the sidewalk of a street in the city, having over his shoulders a piece of oil cloth, which he wore like a vest or coat, on which was printed the inscription, "Lasters on strike. All lasters are requested to keep away from P. P. Sherry until the present trouble is settled. Per order L. P. U." *Held*, that the defendant's act was a violation of the ordinance.

MORTON, C. J. This is a complaint for a violation of an ordinance of the city of Lynn. The part of the ordinance which applies to the case is as follows: "No person shall place or carry, or cause to be placed or carried, on any sidewalk, any show-board, placard, or sign, for the purpose of there displaying the same."

The ordinances were proved by the production by the clerk of the original records of the city, and we do not understand that the defendant now insists upon his objection to the sufficiency of the proof. He contends that the ordinance in question has no legal effect, because it has not been published according to the provision of the Gen. Sts. *c.* 18, § 16,* which was in force when the ordinance was passed. The provisions of the charter of Lynn as to the power to make ordinances are, in effect, the same as those contained in the charter of Boston, as to which it

* This section (reënacted in the Pub. Sts. *c.* 27, § 23) requires the by-laws of a town to be published in one or more newspapers. Section 2 of the Gen. Sts. *c.* 19 (reënacted in the Pub. Sts. *c.* 28, § 2), provides that *c.* 18, and all other laws relating to towns, shall apply to cities "so far as they are not inconsistent with the general or special provisions relating thereto."

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has been decided that no publication is necessary as a condition precedent to the validity of the ordinances. The ordinances of Lynn take effect upon their passage, if no time is therein limited or named. St. 1850, *c.* 184, § 20.* *Commonwealth* v. *Davis*, 140 Mass. 485. *Commonwealth* v. *Brooks*, 109 Mass. 355.

The defendant also contends that the ordinance is unreasonable, and therefore void. The city is authorized "to make all such salutary and needful by-laws" as towns have power to make and establish. St. 1850, *c.* 184, § 20. Towns have power to "make such necessary orders and by-laws, not repugnant to the laws of the State, for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof, as they may judge most conducive to the welfare of the town." Gen. Sts. *c.* 18, § 11. Pub. Sts. *c.* 27, § 15.

The purpose of the ordinance in question is to prevent the placing of show-boards and signs upon the sidewalks so as to obstruct them, and also to prevent the carrying of placards and signs for the purpose of displaying them, of which the tendency and effect might be to collect crowds, and thus to interfere with the use of the sidewalks by the public, and lead to disorder. We cannot say that such a provision applicable to the crowded streets of a populous city is unreasonable.

The remaining question is whether the defendant was shown to have violated the ordinance. It appeared that the defendant walked upon the sidewalk in Munroe Street, having over his shoulders a piece of oil-cloth, which he wore like a vest or coat, on which was printed the inscription, "Lasters on strike. All lasters are requested to keep away from P. P. Sherry until the present trouble is settled. Per order L. P. U."

It does not require argument to show that this is a placard or sign, and that wearing it upon his person like a vest or coat was carrying it for the purpose of displaying it. The natural

* "The city council shall have power to make all such salutary and needful by-laws as towns, by the laws of this Commonwealth, have power to make and establish, and to annex penalties, not exceeding twenty dollars, for the breach thereof; which by-laws shall take effect and be in force from and after the time therein respectively limited, without the sanction of any court or other authority whatever."

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tendency of his act was to collect a crowd and to create disorder, and it falls within the letter and spirit of the ordinance.

Exceptions overruled.

J. R. Baldwin, for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

JOHN D. DOYLE, administrator, *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Suffolk. Nov. 9, 10, 1887. — Jan. 2, 1888. DEVENS & W. ALLEN, JJ., absent.

At the trial of an action of tort, brought by an administrator, under the Pub. Sts. c. 112, § 218, against a railroad corporation, for the death of the plaintiff's intestate, caused by a collision between a locomotive engine of the defendant and a wagon in which the intestate was driving, at a place where the highway crossed the railroad at grade, there was evidence that between two and three o'clock in the morning the intestate delivered milk to a customer who lived a quarter of a mile from the crossing, and that he had another customer near the crossing on the farther side; that his wagon was more than half-way over the crossing, which was one hundred and sixty-eight feet wide, when the gateman cried, "Stop," and shut the gates; that the intestate whipped up his horse, the gateman told him to come on and opened the gate, and the wagon was struck by the locomotive engine, and the intestate instantly killed; and that no bell was rung or whistle sounded on the locomotive. *Held*, that the evidence would warrant an inference that the intestate was awake when approaching the crossing, and a finding that the neglect to ring the bell or sound the whistle contributed to the injury; and that the court could not rule, as matter of law, that the intestate was guilty of gross negligence.

HOLMES, J. This is an action of tort, brought under the Pub. Sts. *c.* 112, § 213, by an administrator to recover for the death of his intestate. It was admitted that the intestate was killed by a collision with the defendant's engine, upon a crossing of a highway at grade within § 163, and there was evidence that neither the bell upon the engine was rung nor the whistle sounded. But the defendant denies that "it appears that such neglect contributed to the injury," as required by § 218, and argues that to allow the connection to be inferred from the

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neglect and the accident alone is to make the clause of the statute nugatory.

The distance between the gates on each side of the crossing was one hundred and sixty-eight feet, and the accident happened more than half-way across. The defendant further argues, that the conduct of the deceased the moment before constituted gross negligence, which, by the terms of the statute, would prevent a recovery. But if the deceased was not guilty of such gross negligence as, by the terms of the statute, would prevent a recovery, then whether there was some neglect on his part, or on the part of the defendant's servant, or the conduct of both was not more ill-judged than might have been expected in the flurry of approaching danger, the intervention of these later causes would not necessarily prevent the neglect to give warning from "contributing" to the injury. *Elmer* v. *Locke*, 135 Mass. 575, 576, and cases cited. *Norton* v. *Eastern Railroad*, 113 Mass. 366. *Commonwealth* v. *Boston & Lowell Railroad*, 134 Mass. 211. The later conduct of the parties, therefore, may be laid out of the case, so far as the first question is concerned, and it may be assumed that, if there was evidence that the defendant's neglect contributed to bring the deceased to where he heard the shout of warning, there was evidence that it contributed to the injury.

Coming then to the defendant's argument which we have stated, we agree that the plaintiff must allege and prove that the neglect of the defendant contributed to the injury. *Wright* v. *Boston & Maine Railroad*, 129 Mass. 440, 444. But it is plain that we cannot expect, and the statute cannot have meant to require, direct evidence of the connection. The only absolutely direct proof possible would have to come from the lips of the person killed. Even if eyewitnesses were produced who saw him watching and listening as he approached, the connection would still be an inference. But a fact proved by a legitimate inference is proved no less than when it is directly sworn to. *Commonwealth* v. *Doherty*, 137 Mass. 245, 247. And the question what inferences are legitimate is not affected by the terms of the statute, but is to be answered in accordance with the general principles of law. To answer this question the court refers to its own knowledge of the ordinary course

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of events so far as to consider whether it can say that there is no probability or presumption of fact that when facts A and B exist, of which there is direct evidence, fact C also exists by way of cause, effect, or concomitant. If it cannot, then it leaves it to the jury to say whether, according to their experience, there is such a probability or presumption. *Commonwealth* v. *Briant*, 142 Mass. 463, 464.

In this case we have a man driving a milk wagon between two and three o'clock in the morning. He was awake a quarter of a mile before reaching the crossing, as he then served a customer with milk. He knew where the crossing was, and he had to serve another customer a short distance on the other side of the crossing. Very plainly, we cannot say that there is no probability that the man was awake as he approached the crossing, or that the jury might not find that there was such a probability, and therefore infer that the deceased was awake. The warning, either by bell or whistle, if it had been sounded, would have been audible, and, as the deceased was not driving in a furious or reckless manner, the jury might infer that he would have heard it. People do not generally try to drive across railway tracks when they know by the bell or whistle that a train is approaching; the jury therefore might find that the deceased would have stopped if the bell had been rung or the whistle sounded.

We cannot say, as matter of law, that the intestate was guilty of gross negligence. The plaintiff's evidence tended to show that the intestate had got half-way across before there was any warning, and before the gates were shut, and that the first warning he received was when the gates were shut and the gateman shouted, "Stop," — a shout which he may have heard only as an alarming sound; that then, practically all at once, the deceased whipped his horse, the gateman shouted to him to come on, and opened again the gate in front of him. We do not say that this seems to us the most probable view of the facts, but it is one which the jury might have taken on the evidence. Going on under these circumstances was a mistake, but we cannot say it was gross negligence. Something must be allowed for the natural impulse which some people feel, when suddenly startled and alarmed, to leap forward, and more

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for the natural tendency to follow the gateman's directions. It is not argued that there was gross negligence before the deceased whipped his horse. See *Copley* v. *New Haven & Northampton Co.* 136 Mass. 6. *Bayley* v. *Eastern Railroad*, 125 Mass. 62. *Commonwealth* v. *Fitchburg Railroad*, 10 Allen, 189, 191.

Exceptions overruled.

S. Hoar for the defendant.

H. E. Swasey & G. R. Swasey, for the plaintiff.

JOHN W. BRYAN *vs.* TRADERS' INSURANCE COMPANY OF CHICAGO.

Suffolk. Nov. 11, 1887. — Jan. 2, 1888. DEVENS & W. ALLEN, JJ., absent.

A policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 139, against loss by fire, upon a house, provided that it should be void if the property should be "sold." During the term of the policy the assured conveyed the property to A. by a deed, absolute in form and duly recorded. On the same day A. executed to the assured a bond to reconvey the property, on the assured indemnifying A. against loss on account of his becoming a surety on a recognizance in a criminal prosecution. This bond was not recorded, and the company issuing the policy had no knowledge of it. Subsequently, A., with the knowledge of the assured, and for his benefit, mortgaged the property insured to C. by an instrument not under seal. After a loss by fire occurred, the mortgage was discharged, and the property was conveyed by A. to the assured, the condition named in the bond having been performed. *Held*, that the property had not been "sold" by the assured, and that he could maintain an action on the policy.

CONTRACT upon a policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 139, against loss by fire, on a building in Brockton. Trial in the Superior Court, before *Knowlton*, J., who ordered a verdict for the plaintiff, and reported the case for the determination of this court. The facts appear in the opinion.

J. A. Maxwell, for the defendant.

J. Bennett & E. O. Cooke, for the plaintiff.

MORTON, C. J. The policy in suit is of the standard form provided by our statute, and contains the provision that the policy shall be void if, without the written assent of the company,

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"the said property shall be sold." After the policy was issued, the plaintiff, who is the assured, conveyed the building insured to one Mary Madigan, by a deed absolute in form, which was duly recorded. At the same time, and as a part of the same transaction, Madigan executed to the assured a bond, upon the condition that she would reconvey the property to him upon his indemnifying her against any damage by reason of her having become his surety in a recognizance in a criminal suit. This bond was never recorded. Afterwards, Madigan, with the knowledge and for the benefit of the plaintiff, mortgaged the premises to one Gallagher for the sum of $3000, which mortgage was recorded, but there was no seal to it, and nothing was paid upon it. After the loss, the mortgage was discharged, and Madigan reconveyed the premises to the plaintiff, the condition of her bond having been performed.

It is clear that, as between the parties, the transaction between the plaintiff and Madigan constituted a mortgage. Its purpose was not to convey an absolute estate, but to give security for the performance of a duty by the plaintiff. It has been repeatedly held that such a transaction is a mortgage, although the bond to reconvey is not recorded. *Murphy* v. *Calley*, 1 Allen, 107. *Foote* v. *Hartford Ins. Co.* 119 Mass. 259. *Walsh* v. *Philadelphia Fire Association*, 127 Mass. 383. The last cited case is singularly like the case at bar upon this point, and it was held that, although the plaintiff had given a deed of the premises insured absolute in form, taking back a defeasance which was never recorded, he was only a mortgagor and still had an insurable interest.

The defendant contends that although this transaction was a mortgage as between the parties, yet as to the defendant it is to be treated as in all respects an absolute conveyance. He relies upon the provision of the statute that "when a deed purports to contain an absolute conveyance of real estate, but is made defeasible by a deed, bond, or other instrument, the original deed shall not be thereby affected, as against any person other than the maker of the instrument of defeasance and his heirs and devisees and persons having actual notice of it, unless such instrument is recorded in the registry of deeds for the county or district in which the real estate to which it relates is situated." Pub. Sts. *c.* 120, § 23.

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The purpose of requiring the instrument of defeasance to be recorded is to give notice to purchasers, attaching creditors, and others who may become interested in the estate, and may rely upon the apparently absolute deed, and thus be misled by the record, if the defeasance is not recorded. *Bayley* v. *Bailey*, 5 Gray, 505. *Pratt* v. *Harlow*, 16 Gray, 379.

Looking at the object of the statute and the mischief intended to be guarded against, we are of opinion that it does not apply to a case like this, where the defendant makes no claim to the property, and could not in any way have been misled by the failure to record the defeasance.

The defendant relies upon *Foote* v. *Hartford Ins. Co.* 119 Mass. 259. Some of the expressions in the opinion support his claim, but they were not necessary to the decision, which may be supported upon the ground that, under the peculiar terms of the policy in that case, providing that it should be void if any change took place in the title or possession of the property, a mortgage would avoid the policy. The question before us was not involved in that case; but in a later case, where the question was involved, it was held that a person who had given an absolute deed, taking back an instrument of defeasance which was never recorded, was a mortgagor, and, as against the insurance company, had an insurable interest. The opinion, written by the same justice, states that "the rights of the parties under this contract of insurance are to be settled according to the relations which were in fact created between the parties to those conveyances, although the defeasances were never recorded. It is not a question between the plaintiff and attaching creditors and purchasers without notice." *Walsh* v. *Philadelphia Fire Association*, *ubi supra*. We do not consider that the attempted mortgage from Madigan to Gallagher is of any importance. Having no seal, it was inoperative, and does not affect the rights of the parties. *Springfield Savings Bank* v. *Springfield Congregational Society*, 127 Mass. 516.

We are then to regard the plaintiff as in the position of one who, after a policy is issued to him, mortgages the property insured, and the remaining question is whether such mortgage avoids the policy under the provision that it shall be void "if the said property shall be sold" without the written assent of

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the company. We do not understand the defendant to contend that this would be the effect of a mortgage, and it is clear that such would not be the effect. After the mortgage the plaintiff retained an insurable interest to the same extent as before. He was interested to the amount of the whole value of the premises, and would bear all the loss in case of fire.

It has been repeatedly held in this and in other jurisdictions, that, where a policy contains a condition that it shall be void upon an alienation by sale or otherwise, a mortgage does not avoid the policy. *Judge* v. *Connecticut Ins. Co.* 132 Mass. 521, and cases cited. Alienation is a broader term than sale. A mortgage is not a sale, and it cannot fairly be contended that the policy in suit was avoided by the mortgage made by the plaintiff. *Verdict to stand.*

COMMONWEALTH *vs.* FRANCIS L. WHITE.

Suffolk. Nov. 21, 1887. — Jan. 2, 1888. DEVENS & W. ALLEN, JJ., absent.

At the trial of an indictment in several counts for forging and uttering twelve bills of parcels, the defendant filed a motion to quash the indictment, but, instead of arguing the motion at the outset, consented that the court should reserve all his rights under it, with the understanding that it would be disposed of at a later stage of the case. After the case for the government was closed, the motion to quash was argued, and the presiding judge quashed several of the counts of the indictment; but refused to strike out the evidence introduced under these counts. *Held*, that, if the evidence was admissible under the remaining counts, the defendant had no ground of exception.

At the trial of an indictment for forging and uttering certain receipted bills of parcels, the persons whose names appeared on the bills as signers testified that they did not sign them, and that the bills did not represent genuine transactions. The defendant, who appeared on the bills as the purchaser of the goods therein mentioned, used the bills, certified upon them that A. was the owner of the goods, received money for them from A., and gave A. his promissory notes for the amount. *Held*, that the evidence was sufficient to warrant a conviction.

At the trial of an indictment for forging and uttering certain receipted bills of parcels, evidence is admissible, on the question of the defendant's knowledge that the bills were forged, that he fabricated certain other unreceipted bills of a like character, and uttered them to the same person to whom he uttered the receipted bills, by a continuous series of transactions, extending some months later than the latest forgery mentioned in the indictment.

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An indictment for forgery described the instrument alleged to be forged as an acquittance and discharge for money, and set forth a bill of parcels purporting to be receipted. *Held*, that the instrument was not misdescribed.

HOLMES, J. 1. The most serious question in this case arises in a way for which the defendant is partly responsible. The indictment was in fifty-four counts, for forging and uttering twelve bills of parcels; and a motion to quash was filed. But the defendant, instead of arguing the motion at the outset, consented that the court should reserve all his rights under it, with the understanding that it would be disposed of at a later stage. Accordingly the trial proceeded, and evidence was put in under all the counts. Then, at the close of the government's case, the motion to quash was called up, and by the consent of the government all but six counts were quashed. The defendant thereupon asked that the evidence introduced under the other counts should be stricken out, but the court refused so to order.

It is suggested that the defendant has suffered by a device intended to get before the jury evidence which was not admissible on the issues upon which he was convicted, under the pretence that it sustained other issues, which were abandoned when the evidence was in. It need not be said that, if this appeared to be the fact, the verdict could not stand. But we cannot gather any such conclusion from the record. The question whether the evidence was admissible upon the issues finally tried is as fully open, and is to be considered on the same principles, as if the counts not quashed had been the only ones from the beginning. If it were true that evidence was offered upon one issue and retained for its bearing upon another, it would be hard to see how the defendant had suffered if it was admissible upon that other, even though the former was a charge of a distinct substantive felony. See *Commonwealth* v. *Stearns*, 10 Met. 256. But, so far as appears, the evidence was offered and admitted generally for any purpose for which it was competent, and if at the time there was a possibility that its chief use was to sustain the other counts, the opposite possibility was no less plain to the defendant, who was insisting that those counts were bad. The uncertainty was by the defendant's consent, who had agreed that they need not be

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passed upon until the evidence was in. We see no reason why he could not consent to a course which preserved all his rights.

We are of opinion that the evidence was admissible under the counts not quashed, upon which the defendant was convicted. These counts were for forging certain receipted bills for hides, &c., and for uttering the same. The evidence objected to tended to show that the defendant fabricated certain other unreceipted bills of a like character, and uttered them to the same persons, by a continuous series of transactions, extending some months later than the latest forgery of which the defendant was convicted.

It appeared that there was a contract between H. Leonard and Company and the defendant, by which Leonard and Company were to sell the defendant hides, which were to be tanned and sold by him, he giving Leonard and Company his note at four months for a little more than the sum paid by them, and the property in the hides remaining in Leonard and Company until all the notes were paid.

The government's evidence tended to show that a frequent course of dealing — or at least the course of dealing as it was made to appear to Leonard and Company in the alleged fraudulent transactions — was, that, instead of Leonard and Company themselves purchasing the hides which the defendant was to tan, the defendant purchased them, presented the bill from the sellers to him, receipted in the earlier transactions, afterwards unreceipted, to Leonard and Company, wrote upon it that the hides belonged to Leonard and Company under the contract, or to that effect, received the cash to pay for them, and gave his note as provided in the contract, just as if Leonard and Company had themselves ordered and paid for the hides, and had then consigned them to him. It will be seen that the use made of the bill, receipted or unreceipted, was to show it to Leonard and Company, in order to satisfy them that hides had been bought, which were to belong to them, and for which they were to pay in the first instance, under the contract, and thus to enable the defendant to get cash, giving his note in return.

All the bills, then, receipted or unreceipted, if known by the defendant not to be genuine, were used by him, in a single scheme of fraud, under his contract with Leonard and Company.

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Lynde v. *McGregor*, 13 Allen, 172, 180. *Jordan* v. *Osgood*, 109 Mass. 457. *Commonwealth* v. *Eastman*, 1 Cush. 189, 216. And on the question of the defendant's knowledge that the bills in issue were not genuine, his possession and use of other similar false bills, about the same time, whether before or afterwards, in a continuous series of transactions with the same persons under the same contract, was competent to show that his use of the former was not innocent. *Commonwealth* v. *Coe*, 115 Mass. 481, 501. *Commonwealth* v. *Hall*, 4 Allen, 305, 306. *Commonwealth* v. *Price*, 10 Gray, 472, 476. *Regina* v. *Forster*, Dearsly C. C. 456. Thus the evidence satisfies the general conditions which have been laid down in similar cases. See further *Commonwealth* v. *Jackson*, 132 Mass. 16, 18. To be sure the evidence was not admissible to prove that the bills in issue were forged; *Costelo* v. *Crowell*, 139 Mass. 588; and the jury were so instructed; and it might be thought that in a case like this, when the bills ran to the defendant, purported to be for hides bought by him, and were certified by him, if the jury believed that the bills were forged it would follow almost necessarily that the defendant knew them to be so, and so it might be thought that the evidence of his use of other false bills was unnecessary for the purpose for which it was admitted, while it tended to prejudice the defendant in the eyes of the jury. But the defendant's knowledge was not admitted; on the contrary, it is still argued that there was no sufficient evidence to warrant the verdict; and evidence of knowledge which otherwise would be admissible is not made inadmissible by the fact that there is other strong evidence of knowledge in the case.

It is argued that the bills not in issue which were put in were not signed, and therefore were not forgeries, and were inadmissible for that reason. It is not necessary to consider whether they were technically forgeries. See *Commonwealth* v. *Ayer*, 3 Cush. 150, 152. *Commonwealth* v. *Hinds*, 101 Mass. 209, 210. For if they were not, they were none the less admissible. Being fabricated instruments similar to those in issue in every respect except in regard to signature, their tendency to show knowledge and a fraudulent scheme on the defendant's part was not affected by the degree or kind of fraud committed in their manufacture and use. They equally purported to be a

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declaration by the supposed sellers, in the course of business, that they had sold the hides mentioned in them to the defendant, whether they acknowledged or demanded payment; and, signed or unsigned, they equally served the purpose of getting the amount of the bill from Leonard and Company.

2. We can have no doubt that the evidence warranted a conviction. The persons by whom the bills purported to be made out and signed testified that they were not genuine, and did not represent genuine transactions. The defendant, who fairly might be presumed by the jury to know the facts about sales purporting to have been made to him, used the bills, certified upon them, and received the money for them, as has been stated. It is suggested that, by the contract, Leonard and Company were authorized to buy for him, and that they may have had the bills made out, or at least that he may have supposed the bills to be genuine and correct; but it is a mistake to say that the contract authorized Leonard and Company to buy as agents for the defendant, or to charge goods to him. The phrase in the contract, "except in case the hides are bought by said Leonard and Company for said White," does not import any such authority. It means only to distinguish hides bought for the purpose of being sold to White from those bought by Leonard and Company in the ordinary course of their business, and afterwards sold to him. And it appears on the face of the contract that the only purpose of this distinction is to adopt a different way of fixing the date from which White shall be charged with interest. The contract throughout contemplated Leonard and Company's purchasing hides on their own behalf, and selling them to the defendant only after his notes had been paid. There was no evidence of any course of dealing by which they bought in his name, or of any case where they had done so, and there was no reason why they should have given their check to him if they had conducted or had purported to have conducted the dealings with the supposed seller of the hides. On the face of the transactions there was evidence that the defendant uttered the bills (3 Inst. 171) knowing them to be false, if they were false in fact. But, in addition, there was evidence as to the Morey bill that Leonard and Company had no transaction with Morey, and

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that the defendant did buy hides corresponding to a part of the hides set forth in the bill; and evidence tending in the same direction as to the other persons named in the indictment, and that all that Leonard knew of the supposed transactions with them he learned from the defendant. It is true that the defendant's clerk could not say from whom he received any particular bill, but he testified that they were all brought by the defendant or left at the office, where the defendant then wrote his name on them and got the money. We do not think it necessary to state the evidence in greater detail. See *Commonwealth* v. *Talbot*, 2 Allen, 161. The fact, if it be one, that the defendant intended to pay his notes at maturity, did not affect his liability. *Commonwealth* v. *Henry*, 118 Mass. 460, 463.

3. The motion to quash was rightly overruled. Each of the counts submitted to the jury describes the bill of parcels set forth in it as an acquittance and discharge for money. The defendant contends that this is a misdescription; but a receipted bill for goods purports to be an acquittance and discharge for the money due in respect of those goods. *Commonwealth* v. *Ladd*, 15 Mass. 526. See *Commonwealth* v. *Talbot*, *ubi supra*. The instrument being set out, and purporting on its face to be the thing prohibited to be forged, Pub. Sts. *c.* 204, § 1, there is no need of further allegations to show how it was that thing, or how it could be used as an instrument of fraud, or that it was so used in fact. 2 East P. C. 977. *Commonwealth* v. *Costello*, 120 Mass. 358. *Commonwealth* v. *Ladd*, *ubi supra*. There is a slight peculiarity in the receipt set out in the seventh count, as it bears, in addition to the words "Terms cash," the words "Our sight draft." But the word "Settled," followed by the signature, imports a discharge of the money due for the price, whether it was discharged by money or draft. Whether it is not to be read as importing a settlement in money, especially in view of the words "Paid for by H. Leonard & Co." in the margin, we need not consider. We notice nothing else in the exceptions which calls for particular remark.

Exceptions overruled.

E. Avery, for the defendant.

A. J. Waterman, Attorney General, & *H. C. Bliss*, Assistant Attorney General, for the Commonwealth.

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COMMONWEALTH *vs.* BEALY F. FOWLER.

Middlesex. Nov. 21, 1887. — Jan. 2, 1888. DEVENS & W. ALLEN, JJ., absent.

A complaint cannot be maintained for the illegal sale of intoxicating liquor to a minor, unless the fact of such minority is averred.

A complaint for the illegal sale of intoxicating liquor to A. is maintained by proof that A. was acting as the agent of an undisclosed principal.

At the trial of a complaint for selling intoxicating liquor to A., there was evidence that A. was a boy eleven years of age; that, at the time alleged, acting as the agent of his father, he ordered the liquor in question and paid for it, and the defendant delivered it at the house where the boy and his father lived; and that he did not disclose his agency to the defendant on this occasion, or on similar previous occasions. The defendant asked the judge to rule that there was no sufficient evidence of a sale and delivery to A. The judge refused so to rule, and instructed the jury that if the boy did not disclose, in any manner, to the defendant, at the time of the alleged sale, that he wanted the liquor for his father, the sale would be to the boy. *Held*, that the instruction might be construed to mean that, if the father was not in any manner disclosed or known at the time as the principal, the charge of a sale to the son was supported by the evidence; and that the defendant had no ground of exception.

At the trial of a complaint for selling intoxicating liquor to A., there was evidence that A., who was a boy eleven years old, had given to him by his father a sum of money to buy liquor for the father; that the boy met the defendant on the street, and ordered and paid for the liquor, which the defendant subsequently delivered at the house where the boy and his father lived; and that the boy did not on this occasion, or on similar occasions, inform the defendant that he was acting as his father's agent. *Held*, that the evidence would warrant the jury in finding that there had been a sale and delivery to A.

COMPLAINT, alleging that the defendant, at Newton, on October 15, 1886, "did sell to one Michael O'Marra intoxicating liquor." Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, in substance as follows:

Michael O'Marra testified for the government that he was eleven years of age in October last, and then lived at Newton, with his father, mother, and grown-up sister, in the father's house; that on said day his father gave him fifty cents, and instructed him to get six bottles of ale from the defendant, who had been in the habit, from time to time, of passing by the house driving a beer wagon; that he took the money, and afterwards met the defendant with the beer wagon in the public street, in front of the house; that the defendant said to him, "What will

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you have to-day, Mickey?" and that he replied, "One half-dozen of ale," and gave the defendant the money, and went away, but not to his house; and that, as he was going away, he looked and saw the defendant, or a man who had been with him just before, carrying what he supposed to be the ale towards his father's house.

He further testified, that he did not, during the above transaction, inform the defendant that his father wanted the ale, or that he bought it for his father, or that his father had sent him to get it. And, testifying with reference to other previous transactions, substantially similar, he said that, while he had always procured the liquor for his father at his request and for his use, he had never informed the defendant of the fact.

The sister of the witness testified that the six bottles of ale were brought by the defendant to the house, and that she put them in the cellar for her father, who was away from home at work.

The defendant testified that the delivery was at the house on all occasions, and not to the son; that he had on his wagon at the time of the sale of six bottles, a large number of bottles of ale and beer.

The defendant asked the judge to rule that there was no evidence of a sale to Michael O'Marra, as a minor, or otherwise; that the defendant could not be convicted on the complaint of a sale to O'Marra as a minor; and that there was no sufficient evidence of any sale and delivery to him. The judge refused so to rule, and instructed the jury that, if the boy did not disclose, in any manner, to the defendant, at the time of the alleged sale, that he wanted the ale for his father, in such case the sale might be alleged and would be to the boy, and in that case an allegation of minority was unnecessary.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

C. ALLEN, J. The fact that Michael O'Marra, the alleged purchaser, was a minor, must be disregarded, it not having been averred. When the government wishes to avail itself of the special statutory provisions respecting a sale or delivery of

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intoxicating liquors to a minor, the fact of minority must be set forth.

The case as proved, then, was a sale by an unlicensed person under a contract made with Michael. If Michael was the agent of an undisclosed principal, the complaint properly charged the sale as having been made to him; but if he was the agent of a disclosed principal, the complaint should have charged the sale as having been made to the principal. See *Commonwealth* v. *O'Leary*, 143 Mass. 95, and cases cited. The defendant now contends that the instruction to the jury was too limited, and that it authorized a conviction, unless Michael himself disclosed his principal at the time of the alleged sale, without adverting to the consideration that his agency for his father might have been well understood from a previous course of dealing, or otherwise. This distinction, however, was not taken at the trial, but the court was asked to rule that there was no evidence of a sale to Michael, or at any rate no sufficient evidence of a sale and delivery to him. The instruction actually given may properly be considered with reference to the requests made; and, if regarded in this manner, may fairly be understood to mean that, if Michael's father was not in any manner disclosed or known at the time as the principal in the transaction, then the charge of a sale to Michael was supported by the evidence. If the defendant had wished to take the distinction upon which he now relies, he should have called attention to it at the trial. The language used by the court was quite similar to that used in *Commonwealth* v. *Gormley*, 133 Mass. 580.

The evidence was sufficient to warrant a verdict of guilty, provided Michael was acting for an undisclosed principal.

Exceptions overruled.

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COMMONWEALTH *vs.* DAVIS LOCKE.

Middlesex. Nov. 22, 1887. — Jan. 2, 1888. DEVENS & W. ALLEN, JJ., absent.

On a complaint for keeping and maintaining a tenement used for the illegal keeping and sale of intoxicating liquors, it is competent to prove the discovery of liquor in the defendant's bar-room, and also the circumstances of the discovery.

On a complaint for keeping and maintaining a tenement used for the illegal keeping and sale of intoxicating liquors, evidence that the defendant's bar-keeper endeavored to conceal intoxicating liquor, while a search was being made under a search-warrant, is admissible, although the defendant was absent at the time, and there was evidence that he had no knowledge that intoxicating liquor was sold there.

On a complaint for keeping and maintaining a tenement used for the illegal keeping and sale of intoxicating liquors, the jury may infer that intoxicating liquor is being kept for the purposes of unlawful sale from the fact of its presence in the tenement, and an attempt by the defendant's servant to conceal it.

COMPLAINT, on the Pub. Sts. *c.* 101, §§ 6, 7, for keeping and maintaining a common nuisance, to wit, a tenement in Cambridge, used for the illegal sale and illegal keeping of intoxicating liquors, on May 1, 1887, and on divers other days and times between that day and June 4, 1887. Trial in the Superior Court, before *Barker*, J., who allowed a bill of exceptions, in substance as follows:

On Tuesday, May 24, 1887, several police officers of Cambridge, with a search-warrant, visited Porter's Hotel, Cambridge, of which the defendant was the proprietor, and searched the hotel for intoxicating liquors. Coulter, one of the officers, immediately entered the bar-room, in which no one was present but the bar-keeper. Coulter testified that on entering the bar-room he immediately proceeded around the bar to the place where the bar-keeper was, and that the bar-keeper had in his hands a measure, the contents of which he was attempting to throw into the sink. The officer attempted to seize the measure, the bar-keeper resisted, and in the struggle the contents of the measure were spilled upon the floor. The officer testified that gin was spilled on the floor, and that a small quantity of whiskey was found in a measure under the bar. The defendant objected to the introduction of this evidence of the acts of the bar-keeper in the absence of the defendant, unless it was shown in some way that

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the defendant knew and consented to them; but the judge ruled that they were admissible in evidence.

The defendant testified that, prior to May 1, 1887, he had been licensed; that nothing was for sale in the bar-room except hop beer and tonics, and that nothing intoxicating had been, to his knowledge, brought there or sold there since the expiration of his license.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

G. F. Piper, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

HOLMES, J. It was competent to prove the discovery of gin and whiskey in the defendant's bar-room. *Commonwealth* v. *Kahlmeyer*, 124 Mass. 322. *Commonwealth* v. *Intoxicating Liquors*, 116 Mass. 27. Therefore it was competent to prove the circumstances of the discovery. But, further, evidence of the bar-keeper's conduct was admissible in connection with the other facts as tending to show that the defendant was guilty. If liquor was kept for sale in the defendant's bar-room by the defendant's bar-keeper, the jury might think it unlikely, as matter of common experience, that it would be kept for sale there without the defendant's consent, and might infer his consent on that ground. *Commonwealth* v. *Briant*, 142 Mass. 463, 465. *Commonwealth* v. *Holmes*, 119 Mass. 195. *Commonwealth* v. *Edds*, 14 Gray, 406, 409. *Commonwealth* v. *Nichols*, 10 Met. 259. And they might infer that the liquor was kept there for the purpose of unlawful sale, from its presence and the attempt to conceal it.

Exceptions overruled.

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COMMONWEALTH *vs.* PATRICK H. CARROLL.

Middlesex. Nov. 22, 1887. — Jan. 2, 1888. DEVENS & W. ALLEN, JJ., absent.

A complaint may be made by any one who is competent to make oath to it.

If a court has jurisdiction over offences committed within a certain city, a complaint to that court, which alleges the offence to have been committed at that city, sufficiently alleges the jurisdiction of the court.

Under the Pub. Sts. *c.* 112, § 206, the throwing of a missile at a car is a punishable offence, whether the car was in use at the time or not.

In a complaint for throwing a missile at a car, any defect in the description of the car, or defect in respect of the place where the car was at the time, is a defect in form, which cannot be availed of for the first time in the Superior Court on appeal.

Proof of a statute chartering a corporation under a particular name, and of other statutes authorizing the corporation to do particular acts, and the act of the railroad commissioners approving the consolidation of the corporation with another corporation, in pursuance of an authority conferred upon them by statute, will warrant a finding of the existence of the corporation, and of its ownership of property which it employs in exercising its franchise.

The existence of a corporation, not organized under the Pub. Sts. *c.* 106, and which has not availed itself of the provisions of § 22, may be proved, without producing the certificate of the Secretary of the Commonwealth mentioned in that section.

If a car is described in a complaint as the property of a certain street railway company, a witness may properly testify what words and marks were on the car, and another witness may testify that a car with those marks on it belonged to the company mentioned in the complaint.

At the trial of a complaint, under the Pub. Sts. *c.* 112, § 206, for throwing a stone at a car, the judge is not required to give to the jury a definition of the word "stone."

COMPLAINT, under the Pub. Sts. *c.* 112, § 206, by William F. Batchelder, to the Justice of the Third District Court of Eastern Middlesex, alleging that the defendant, on February 20, 1887, at Cambridge, "wilfully did throw a certain missile, to wit, a stone, at a certain street railway car of the property of the Cambridge Railroad Company, a corporation duly established by law."

In the Superior Court, on appeal, before the jury were empanelled, the defendant moved to quash the complaint, for the following reasons: 1. The complaint is not made by any competent and proper person or authority. 2. There is no averment, and nothing to show, that the alleged offence was

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within the jurisdiction of the lower court. 3. There is no proper and fit description of the railway car. 4. There is no proper and sufficient description of the place where the said car was, or in what street it was, or that it was in any public place whatever. *Barker*, J., overruled the motion.

The defendant was then tried, and found guilty; and a bill of exceptions, in substance as follows, was allowed.

The testimony tended to show that on Sunday, February 20, 1887, between four and five P. M., a certain horse-car was passing in and along Webster Avenue, at the junction of Windsor Street, in Cambridge, going towards Somerville, and that a stone was thrown from the sidewalk towards the car by some one, the stone not hitting the car, unless possibly by a rebound.

The government offered three witnesses, who testified that the defendant was the person who threw it. The defendant then testified that he threw no stone, and presented five witnesses, who were with him all the time, and who testified that he threw nothing. No stone or other missile was produced at the trial. Neither of the government witnesses undertook to describe the thing alleged to have been thrown, otherwise than as a stone, and about the size of a goose's egg, and dark.

The government offered in evidence the St. of 1853, *c.* 383, incorporating the Cambridge Railroad Company, the St. of 1872, *c.* 17, authorizing said company to increase its capital stock, the St. of 1883, *c.* 37, authorizing said company to issue mortgage bonds, and the St. of 1886, *c.* 229, allowing, with the approval of the railroad commissioners, any of the street railway companies authorized to run cars in the city of Boston to consolidate with any other street railway corporation. The government also offered in evidence an alleged agreement of consolidation between the Cambridge Railroad Company and another street railway company, dated in September, 1886, and having at the bottom the assent thereto of the railroad commissioners. The government produced no further evidence of the incorporation of the Cambridge Railroad Company.

The government asked one of its witnesses, "What, if anything, was painted on the car?" The defendant objected to the question, but the judge admitted it. The witness answered

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that he knew that the words "Webster Avenue and Park Square" were on it. Another government witness was asked the same question, under objection, and he replied that the words "Cambridge Railroad Company" were painted on the car; also, "No. 13."

The superintendent of the road testified that the car numbered 13, with the words painted outside, "Cambridge Railroad Company," was the property of the Cambridge Railroad Company.

The defendant asked the judge to instruct the jury as follows: "1. The burden is upon the government to prove that the Cambridge Railroad Company was at the time of the alleged offence a duly incorporated company, and that that was its correct name; and that this car belonged to that corporation, and was then and there its property and in its possession, custody, control, and use. 2. There has been no competent legal evidence offered of the organization and existence of this alleged corporation. 3. The certificate of the Secretary of State is indispensable. 4. Under this complaint the burden is upon the government to prove, beyond reasonable doubt, that the alleged missile was a stone. It is not enough to show it to be a hard, compact body of any form or size. 5. A stone is a concretion of some species of earth, as lime, silex, clay, and the like, usually in combination with some species of air or gas, with sulphur, or with a metallic substance."

The judge declined to instruct the jury as requested, but instructed them as follows: "The government must prove, beyond a reasonable doubt, all the facts alleged in the complaint as alleged, except that the date is not material; that it was a stone, and not another missile; that the defendant did wilfully throw it at a certain railway car; that the car was the property of the Cambridge Railroad Company; and that that company was a corporation duly established by law. The judge declined to give the definition of a stone asked, or any definition of a stone or of a missile.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

G. W. Searle, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

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HOLMES, J. 1. The motion to quash was rightly overruled. Any one may make a complaint who is competent to make oath to it. The offence is alleged to have been committed at Cambridge, and therefore is shown to be within the jurisdiction of the court. St. 1882, *c.* 233. In the opinion of a majority of the court, the Pub. Sts. *c.* 112, § 206, must be construed to punish throwing a missile at a car whether in use or not, and therefore it was unnecessary to allege that the car was in use at the time. It was also unnecessary to describe the car more particularly, and if there had been any defect in this respect, or in respect of the place, it would have been a defect of form, which could not be objected to for the first time in the Superior Court. Pub. Sts. *c.* 214, § 25.

2. The evidence of the existence of the corporation was competent. *Commonwealth* v. *Bakeman*, 105 Mass. 53, 60. Pub. Sts. *c.* 169, §§ 68, 69. The certificate of the Secretary of the Commonwealth, provided for in the Pub. Sts. *c.* 106, §§ 21, 22, is for corporations established under that chapter, or taking advantage of its provisions. It was also competent to prove the ownership of the car by the testimony of one witness describing its particular marks, coupled with that of another that the car bearing those marks belonged to the company. Moreover, possession was enough. Pub. Sts. *c.* 214, § 14.

3. The instructions requested were given in substance, so far as correct and material. The word "stone" did not need definition. *Exceptions overruled.*

COMMONWEALTH *vs.* JOHN MCNEFF.

Middlesex. Nov. 22, 1887. — Jan. 2, 1888. DEVENS & W. ALLEN, JJ., absent.

On a complaint for keeping and maintaining a tenement used for the illegal keeping and sale of intoxicating liquors, if illegal sales on two different days are proved, the element of the continuing use of the tenement for that purpose, which would not necessarily follow from one sale, may be inferred by the jury.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal keeping and illegal sale of intoxicating liquors, it appeared that the defendant had a license of the first class to sell intoxicating liquors. There was

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evidence of sales made by the defendant to a person known by him to be a drunkard, and that at the trial of another case the defendant testified that he knew that this person had frequently been intoxicated, but had never sold to him when intoxicated, but only when he was not intoxicated. The judge instructed the jury that they must be satisfied that the defendant knew that this person was a drunkard, or that he had been intoxicated within six months. The judge further instructed the jury that evidence of sales to a person who was a drunkard or a person intoxicated, and known to the defendant to be intoxicated, would be evidence on which the jury might convict, but omitted to state the requirement of the Pub. Sts. *c.* 100, § 9, *cl.* 4, that the person must be "known to be a drunkard." The judge's attention was not called to this omission. *Held*, that the defendant had no ground of exception to the rulings given.

At the trial, on appeal, of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the conviction of the defendant must be of the same offence of which he was convicted in the court below, but need not be upon the same evidence.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, evidence of illegal sales of such liquors was admitted, and the defendant's bill of exceptions did not show whether they were made during the time included in the complaint. *Held*, that the defendant showed no ground of exception.

COMPLAINT, to a trial justice, on the Pub. Sts. *c.* 101, §§ 6, 7, for keeping and maintaining a common nuisance, to wit, a tenement in Hopkinton, used for the illegal sale and illegal keeping of intoxicating liquors, on May 1, 1886, and on divers other days and times between that day and November 1, 1886.

Trial in the Superior Court, on appeal, before *Bacon*, J., who allowed a bill of exceptions, in substance as follows:

It was agreed that the defendant had a license of the first class to sell liquors to be drunk on the premises.

The government put in evidence tending to prove one sale at five o'clock in the morning of July 3, 1886, and another sale made at about the same hour on July 4, 1886, which was on Sunday. This was the evidence on which the defendant was convicted before the trial justice.

The government also offered evidence of sales made to one O'Brien, a person who testified that he had been a drunkard during the past year, that he had been convicted several times of drunkenness during the same period, and that he was known to have been a drunkard by the defendant.

The defendant objected to this evidence, on the ground that it was not evidence of the same offence of which he was convicted before the trial justice. The judge ruled that the evidence was

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admissible as tending to prove the offence alleged in the complaint. To this ruling the defendant excepted.

There was evidence that in the trial of another case, in October, 1886, the defendant testified that he knew said O'Brien had frequently been intoxicated, but that he had never sold to him when he was intoxicated, although he had sold to him when he was not intoxicated.

The defendant objected to the admission of this testimony, on the ground that there was nothing to show that it referred to the time mentioned in the complaint. The judge ruled that the evidence was admissible, but that the jury must be satisfied that the defendant knew he was a drunkard, or that he had been intoxicated within six months; and the defendant excepted.

The defendant asked the judge to instruct the jury, that a building cannot be said to be used for the illegal sale of intoxicating liquors, within the meaning of the Pub. Sts. *c.* 101, § 6, which makes it a nuisance, nor can the proprietor be said to keep or maintain such common nuisance, within § 7, on the strength of casual sales made without premeditation in the course of a lawful business; and that not only do the words "keep or maintain" import a certain degree of permanence, but the same idea is usually a part of the conception of a nuisance.

The judge refused so to rule, and instructed the jury that "evidence of more than one sale of intoxicating liquors by the defendant contrary to the terms of his license would be evidence for the jury to consider upon the question whether he kept a nuisance, and that evidence of one sale would not be sufficient to convict the defendant. Evidence of sales to a person who was a drunkard, or a person intoxicated and known to the defendant to be intoxicated, would be evidence on which the jury might convict the defendant if he kept the premises for the purpose of making such sales."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

P. J. Doherty, for the defendant, cited *Commonwealth* v. *Adams*, 4 Gray, 27; *Commonwealth* v. *Patterson*, 138 Mass. 498, 500.

A. J. Waterman, Attorney General, for the Commonwealth.

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HOLMES, J. 1. *Commonwealth* v. *Patterson*, 138 Mass. 498, did not decide that even a single illegal sale might not be evidence of maintaining a liquor nuisance, (*Commonwealth* v. *Coolidge*, 138 Mass. 193,) but simply that a single sale, made it might be casually and without premeditation, could not be said necessarily, and as matter of law, to make the seller guilty of maintaining such a nuisance. If illegal sales on two different days were proved, the element of the continuing use of the building for that purpose, which would not necessarily follow from one sale, would be inferred more easily, and might be inferred by the jury. *Commonwealth* v. *Tabor*, 138 Mass. 496. *Commonwealth* v. *Murray*, 138 Mass. 508. The ruling of the court on this point was sufficiently favorable to the defendant.

There was an oversight in the instruction that "evidence of sales to a person who was a drunkard, or a person intoxicated and known to the defendant to be intoxicated, would be evidence," &c., as it did not explicitly require that the drunkard should be "known to be a drunkard." Pub. Sts. *c.* 100, § 9, *cl.* 4. But an important part of the evidence was admitted, as we understand it, partly at least, for the purpose of showing that the defendant knew that a person to whom he sold was a drunkard, and the jury were then told that they must be satisfied that the defendant knew it. The defendant's knowledge seems to have been one of the controversies in the case; and, as the judge's attention was not called to this slip of language, we think it fair to assume that the words "known to the defendant to be intoxicated" were understood to extend the requirement of knowledge by implication to the case of the drunkard also, or at least that the omission was not understood to overrule the requirement of knowledge which had been laid down before, and which the whole course of the case had shown to be insisted on as material.

2. The exceptions do not show when the sales to O'Brien took place. We infer that they were not the same sales which were proved before the trial justice; but if, as may be presumed, they were sales within the time during which the defendant is alleged in the complaint to have maintained the nuisance, they tended to establish the same offence of which the defendant was convicted below. *Commonwealth* v. *Ronan*, 126 Mass. 59. The

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sales were not the offence, as in *Commonwealth* v. *Blood*, 4 Gray, 31; but only evidence of the offence. But if the sales had been before the time laid in the complaint, they would have been admissible, so far as appears, upon the question whether the defendant kept the house. *Commonwealth* v. *Kelley*, 116 Mass. 341.

3. The evidence that the defendant testified in another case, in October, 1886, "that he knew said O'Brien had frequently been intoxicated, but that he had never sold to him when he was intoxicated, although he had sold to him when he was not intoxicated," was admissible as tending to show that the defendant knew that O'Brien was a drunkard between May 1 and November 1, 1886, if the other testimony showed sales to O'Brien during that time, which must be presumed, if material, against the excepting party. But if the sales to O'Brien were not made at that time, still, so far as appears, the evidence was admissible "as tending to show, in the absence of any apparent change, the nature of the defendant's continuous occupancy of the premises as keeper." *Commonwealth* v. *Carney*, 108 Mass. 417.

Exceptions overruled.

UNITED SOCIETY, CALLED SHAKERS, *vs.* FRANK A. BROOKS.

Berkshire. Sept. 27, 1887. — Jan. 3, 1888. C. ALLEN & HOLMES, JJ., absent.

A., the owner of land with growing trees upon it, entered into a contract, under seal, with B., which stated that A. "agrees to sell," and B. "agrees to buy" all the hemlock bark, and all the hemlock and spruce timber standing on the land. B. agreed to cut and remove the same within four years, to cut and remove a certain amount each year, and to pay certain prices per cord for the bark, and per thousand feet for the timber. It was further agreed that all the trees that were down, or that should thereafter fall, should be cut and paid for by B. The contract provided for measurements to be made by A. on notice to B., and for notice to A. by B. when a sufficient quantity was ready for measurement. *Held*, that the contract was an executory agreement for the sale of timber and bark; that the property in the trees did not pass to B. until they were cut; and that, on B.'s not fulfilling his contract, A. was entitled to recover only such damages as he had sustained on the basis that the timber and bark remained his property until severed from the soil.

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CONTRACT, for breach of the following instrument, under seal, executed by the parties in the presence of one witness:

"This agreement, made this twenty-seventh day of December, A. D. 1879, by and between the United Society, called Shakers, of Pittsfield and Hancock in said county of Berkshire, and Franklin A. Brooks of North Adams in said county of Berkshire, witnesseth: That the said United Society agrees to sell and Brooks agrees to buy all the hemlock bark and all the hemlock and spruce timber now standing, growing, and being on the land owned by said United Society, and situate in Stamford in the State of Vermont, and known as the 'Mountain lot,' containing about four hundred acres of land. And said Brooks agrees to purchase, take, cut, and remove all the hemlock timber and hemlock bark from said Mountain lot within four years from this date, and also all the spruce timber within five years from this date, and agrees to pay for the same the following sums or prices, viz.: all hemlock bark the sum or price of two and 25-100 dollars per cord, all hemlock lumber at one dollar and twelve and one half cents per thousand feet, and all spruce timber two and 75-100 dollars per thousand feet. All hemlock bark in each and every year cut and peeled shall be paid for on or before September first in each and every year. And all hemlock and spruce timber cut in each and every year shall be paid for respectively on the first days of June and December in each and every year, all payments to be made at the office of said United Society in said Pittsfield. Said Brooks shall cut, peel, and pay for not less than one hundred and fifty cords of hemlock bark in each and every year until the end of the term, or until all the hemlock bark is cut, peeled, and removed from said Mountain lot, and said Brooks shall also cut, remove, and pay for at least one fifth part of all the spruce timber on said Mountain lot in each and every year during the entire term, or until the whole is cut, removed, and paid for; it is also further hereby agreed that all spruce and hemlock trees which are down, or which may hereafter fall, which will make fair merchantable lumber, shall be cut, removed, measured, and paid for by said Brooks. And said Brooks is also to use due care in cutting and removing said spruce and hemlock lumber, so as not to injure the hard-wood timber which may be on said Mountain lot. And

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said Brooks is to cut and remove all the spruce and hemlock lumber and timber clean as he goes, and to do the same in a proper, skilful, and workmanlike manner, and he shall cut, remove, and pay for all such spruce and hemlock timber as will measure six inches through at the small end.

"It is also hereby agreed that the hemlock bark may be measured on the lot, or in the tannery yard of said Brooks, or at both of said places, as shall be found most convenient. The trustee of said United Society, or their agent, shall measure all the hemlock bark, and said Brooks or his agent may be present at all such measurements and see that the same is fairly and properly measured, and said trustee or their agent shall give said Brooks due notice of all measurements of bark in order that he or his agent may, if he desires, be present at such measurements. All spruce and hemlock logs shall be measured in the saw-mill yard, in lots of ten thousand feet and upwards, to be measured by the trustee of said United Society or their agent, giving notice, &c. in the same way as is to be done in the measurement of the said hemlock bark. All the hemlock and spruce timber and logs shall be measured by the rule known as Scribner's rule for measuring timber in the log, and shall be measured as follows, viz.: All logs sixteen feet long and under to be measured at the small end; all logs from and above sixteen feet to thirty feet in length are to be measured at the middle, and all logs above thirty feet in length shall be measured in sections of twelve feet each, all by Scribner's rule.

"And it is further hereby agreed that after the first year of this agreement the said United Society may and shall have the right to put on to said Mountain lot men to cut and remove the hard-wood timber, or they may sell the same to others to cut and remove, and said Brooks shall in no way hinder or interrupt them in so doing. Nor shall said United Society, or those whom they put on or sell to, in any way or manner hinder or interrupt said Brooks in his work of cutting, peeling, and removing the bark, spruce and hemlock timber, but both and all shall do all in their power to accommodate each other.

"And said Brooks shall as often as he shall get ten thousand or more feet of lumber ready to be measured, and when he shall have a quantity of bark peeled and ready for measurement he

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shall notify the said United Society or their agent of that fact, and the same shall be then measured as before stated."

Writ dated October 19, 1885, and returnable to the Superior Court.

The case was sent to an auditor, who made a report, in substance as follows: At the time of making the contract the parties thereto were and they still are residents of this county. The defendant, working under it, has cut and sold from the premises referred to therein two hundred and eleven thousand feet of spruce lumber, one hundred and fifty thousand feet of hemlock lumber, and one hundred and nine cords of bark. A few thousand feet of timber, cut under the authority of the defendant, remain on the lot, but the defendant has paid for all timber and bark cut on said lot by him or his authority, the last payment being made about July 1, 1884, by a note which matured about September 1, 1884. No peeling of bark has been done by the defendant, or by any one acting under him, on said lot, since the fall of 1880. The last cutting of timber on the lot by the defendant, or those claiming under him, was done in the spring of 1884. The plaintiff has in all respects complied with its part of said contract. There is a quantity of spruce and hemlock timber, with bark, now growing on the lot mentioned in the contract, and covered by its terms or stipulations.

The plaintiff contended that said contract, being under seal, operated to convey to the defendant a present or immediate title to the spruce and hemlock timber and hemlock bark growing on said lot, with a certain interest in the soil of the lot, and that, under said contract, it was entitled to recover, as damages, the value of said spruce and hemlock timber and bark so growing on said lot, at the price therefor named in said contract, with interest thereon.

The defendant contended that said contract was executory only, and that it did not, by its terms and in legal effect, at once transfer to the defendant the title to the said spruce and hemlock timber, and hemlock bark, and that, under said contract, the plaintiff could only recover such damages as it should prove it had suffered; and that said damages must be assessed upon the basis that the said timber and bark, so far as the same were

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unsevered from the soil, had continued, since the execution of said contract, the property of the plaintiff.

The defendant further contended, that, if said contract was to be construed as conveying to the defendant, immediately upon its execution, the title to, and ownership of, said timber and bark, and an interest in the soil of said lot, then the said contract was invalid by the law of the State of Vermont. Upon this question were cited in evidence the Gen. Sts. of Vt. *c.* 65, § 4, and the following decisions of the Supreme Court of that State. *Day* v. *Adams*, 42 Vt. 510. *Mining & Quarrying Co.* v. *Windham County Bank*, 44 Vt. 489. *Cady* v. *Sanford*, 53 Vt. 632.

The parties agreed that the time for getting off from said lot the hemlock timber and bark should be considered as having expired on January 1, 1884, and for getting off the spruce timber on January 1, 1885.

The auditor found that on January 1, 1884, there were left standing on said lot one hundred and fifty thousand feet of hemlock timber, and one hundred and sixteen cords of hemlock bark, and that on January 1, 1885, there were left standing on said lot two hundred and thirty thousand feet of spruce timber, all of which it was the defendant's duty, according to the terms of the said contract, to have cut, removed, and paid for.

The auditor further found, that, if the plaintiff's contention was correct, it was entitled to recover $1062.25, with interest; and that, if the defendant's contention was correct, the plaintiff was entitled to recover $300, with interest from the date of the writ.

At the hearing, before *Bacon*, J., the auditor's report was put in evidence, and the judge ruled that the plaintiff was entitled to recover the larger sum stated in the report, and ordered judgment accordingly. The defendant alleged exceptions.

A. Potter, for the defendant.

A. J. Waterman & E. M. Wood, for the plaintiff.

KNOWLTON, J. We are to determine in this case whether the writing declared on passed a title to the defendant in the trees growing upon the land, or whether it was an executory agreement for the sale of chattels, to take effect after they should appear in the form of timber, lumber, and bark.

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An oral contract purporting to be a present sale of growing wood and timber, with a privilege of entering upon the land to remove it, is held not to be within the statute of frauds, but a sale of chattels, which changes the ownership as fast as the trees are severed from the real estate under the license granted to the purchaser. *Claflin* v. *Carpenter*, 4 Met. 583. *Giles* v. *Simonds*, 15 Gray, 441. *Drake* v. *Wells*, 11 Allen, 141. If a contract for the sale of growing wood and timber is in the form required for a conveyance of real property, it becomes a question of construction, upon the language of the whole instrument, whether it was intended immediately to pass a title to an interest in land, or whether by its terms it is executory. *White* v. *Foster*, 102 Mass. 375.

In the case at bar, the property was in Vermont, and the parties entered into a contract, under seal, which was not signed in the presence of two witnesses, or acknowledged, or recorded, as was required by the law of that State, to make a conveyance of an interest in land good against others than the grantor and his heirs. By the first language of stipulation in the instrument, the plaintiff agreed to sell, and the defendant agreed to buy, "all the hemlock bark, and the hemlock and spruce timber, now standing," &c. In the next sentence the defendant agreed "to purchase, take, cut, and remove" the timber and bark "within four years" from the date of the agreement. Then followed provisions as to the quantity to be cut in each year, the prices to be paid per cord for the bark, and per thousand for the hemlock lumber and for the spruce timber, and the times for payments. Measurements were to be made by the plaintiff or its agent, at places specified in the contract, with notice to the defendant in all cases to enable him to be present at them. Other details for proceeding in execution of the contract were inserted, with a stipulation in these words, "It is also further agreed that all spruce and hemlock trees, which are down, or which may hereafter fall, which will make fair merchantable lumber, shall be cut, removed, measured, and paid for by said Brooks."

The language of the writing was "agrees to sell," and "agrees to buy," not "sells," and "buys." In the second sentence four years were given in which to perform the agreement "to purchase,"

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as well as the agreement "to take, cut, and remove" the timber. The instrument in all its parts seemed to look to future action and future results, rather than to a present change of title. The property to be transferred had no existence in the form in which it was referred to in the contract. It was called bark, lumber, and timber, and was to be first put into that form, and then measured and paid for, at certain prices by the cord and by the thousand.

The general rule as to sales of personal property is, "that where any operation, as surveying, weighing, measuring, counting, or the like, remains to be performed, in order to ascertain the price, or the quantity, or the parcel to be delivered, the contract is incomplete, and the property does not pass." *Mason* v. *Thompson*, 18 Pick. 305.

Interpreting this instrument in the light of all its provisions, we find it to have been, not an executed contract of sale, but executory. It follows, that, so long as the timber and bark remained standing, no property in it passed under the contract, and that the value of the wood and timber left uncut upon the lot should not have been included in the damages awarded to the plaintiff at the trial. Upon the facts there presented, the plaintiff should have been permitted to recover, as damages for the non-fulfilment of the defendant's contract, $300, and interest from the date of the writ.

Exceptions sustained.

HELEN E. PHELPS *vs.* GEORGE W. PHELPS & others, executors, & others.

Hampden. Sept. 27, 1887. — Jan. 3, 1888. C. ALLEN & HOLMES, JJ., absent.

A bill in equity, brought by a creditor of A., was submitted to this court upon an agreed statement of facts, which showed that the plaintiff was a creditor of A.; that A. was a *cestui que trust* under a will, which gave him the income of certain property for the support of himself and his son, and provided that the support of the son should be as the father directed; and that all claims against the estate of the testator had been paid, and the executors of the will had a large amount

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of property in their hands applicable to the bequest to A. and his son; but did not show the amount of the trust fund, nor the income, nor the age and condition of the son, nor what was needed for his support, nor whether the whole or any part had been appropriated for that purpose. *Held*, that the case stated was imperfect, and should be discharged.

BILL IN EQUITY against the executors of the will of Willis Phelps, John Wesley Phelps, and Willis Phelps, 2d, alleging the following facts:

On March 26, 1885, the plaintiff was divorced from John Wesley Phelps, and said John was ordered by a decree of this court to pay her, as alimony, the sum of $1200 annually, in equal quarterly payments, after the date of the decree. One of these payments has become due, and said John has neglected to pay the same; and he has no property which can be come at to be taken to satisfy any execution which might issue therefor.

The will of Willis Phelps, after disposing of the income of one half of his estate, provides as follows: "The income of the other half of my estate, both real and personal, ... is to be given to my son, John Wesley Phelps, for the support of himself and son, Willis Phelps, 2d. (The support of the son shall be as the father shall elect.)"

The bill further alleged that there was then in the hands and possession of the executors a large amount of property, both real and personal, and the proceeds of real estate sold by authority of the will; "that the income of one half thereof is largely in excess of the amount needed for the proper support of said Willis Phelps, ... and largely in excess of any sum by the said John W. used and appropriated therefor;" and "that the excess thereof, above what is reasonably necessary for the support of said Willis Phelps, or the whole thereof, is payable to said John W. Phelps, and should be used for the payment of the alimony decreed to the plaintiff, as the same from time to time becomes due."

The prayer of the bill was for a decree directing the executors to pay to the plaintiff the amount then payable to her under said decree, and, from time to time thereafter, to pay such sums as should become due thereunder, out of the income of said one half of said estate, after making suitable provision for the

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support of Willis Phelps, 2d, and for a decree fixing the amount to be appropriated for his support.

The case was heard by *W. Allen*, J., and reserved for the consideration of the full court, upon an agreed statement of facts, which, after stating that the pleadings might be referred to, proceeded in substance as follows:

John W. Phelps has paid nothing under the decree for alimony. Willis Phelps, 2d, is a minor, under the care of his father, and without means of support, except under the provisions of said will. More than two years have elapsed since the executors gave bonds for the performance of their trust, due notice was given of the appointment, all claims against the estate have been paid, and there is a large amount of personal and real estate in the hands of the executors in this State, to which the residuary clause of said will applies.

If, in the opinion of the court, the bill can be maintained, the case may be referred to a master to determine the amount of the income of said estate, and what part thereof should be applied for the maintenance of Willis Phelps, 2d, and what part for the satisfaction of the plaintiff's claim, subject to such rights as the executors of said will, or any person interested in said will, may have, if any, to retain or hold any sums due said John W. under said will, for any debts or sums owing by him to said estate, or to the testator in his lifetime.

G. Wells, for the plaintiff.

G. M. Stearns, for J. W. Phelps and W. Phelps.

MORTON, C. J. The statement of facts upon which the case is submitted to the court is imperfect, and does not contain enough to enable us to determine the rights of the parties. It has been held that, under the will of Willis Phelps, his son John W. Phelps does not take the income of one half of the residue absolutely, but it comes into his hands charged with a trust for the support of his son Willis Phelps, who could enforce its due appropriation in part for his benefit in a court of equity. *Phelps* v. *Phelps*, 143 Mass. 570.

Under the terms of this will, John W. would have the right to appropriate the whole of the income coming to him for the support of Willis, if it was reasonably needed for that purpose. The plaintiff's bill proceeds upon this view of the will, and

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alleges that "the income of one half thereof is largely in excess of the amount needed for the proper support of the said Willis Phelps, ... and largely in excess of any sum by the said John W. used or appropriated therefor." But the statement of facts does not show what the amount of the trust fund is, what the income is, what the age or condition of Willis is, or what is needed for his support, or whether the whole or any part of it has or not been appropriated for that purpose. It is not the right of parties or their counsel to submit a case upon a statement of facts which is imperfect and inconclusive in itself, with an agreement that if, upon any facts, the plaintiff's case can be maintained, the case may be referred to a master or assessor to determine whether such vital facts exist. This is what the parties have attempted in this case. It is asking the court to pass upon a case which may never arise, and to decide questions which may be purely speculative. *Smith* v. *Cudworth*, 24 Pick. 196.

We can only decide now that upon the facts stated the plaintiff cannot maintain her bill. Whether she can do so upon any state of facts cannot be decided until the facts are settled. But, as the case was probably presented in this form under a misapprehension as to the rights of the parties, we are of opinion that the just and proper result is that the reservation and case stated should be discharged. *Old Colony Railroad* v. *Wilder*, 137 Mass. 536. *Order accordingly.*

MANUFACTURERS' FIRE AND MARINE INSURANCE COMPANY *vs.* WESTERN ASSURANCE COMPANY.

Suffolk. Nov. 14, 1887. — Jan. 3, 1888. DEVENS & W. ALLEN, JJ., absent.

A policy of insurance against loss by fire was issued by an insurance company to a corporation, payable to "A., trustee for mortgage bondholders." By the terms of the policy it was to become void, if, without the assent of the insurer, any change should take place in title or possession. On the same day the insurance company reinsured one half of its risk, and received a policy made out on a printed blank form adapted to insurance on property directly. By the printed

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provisions a sale or transfer of the property insured, or the entry of a decree of foreclosure, without the consent of the insurer, terminated the risk. Attached to the policy was a slip, also in print, as follows: "This policy to be subject to the same risks, conditions, valuations, indorsements, privileges, assignments, and mode of settlement as are or may be assumed or adopted by" the first company, "and the loss, if any, payable *pro rata*, at the same time and in the same manner as by said company." Subsequently, the mortgage was foreclosed, and the property sold. It was bought by a person representing the bondholders, to whom the first policy was assigned, with the assent of the company issuing it; but no notice was given to the company reinsuring the risk. A loss by fire afterwards occurred, and was paid by the first company. *Held*, that it could maintain an action on the policy of reinsurance for the amount thereby insured.

CONTRACT upon a policy of reinsurance. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts in substance as follows:

On October 27, 1884, the plaintiff issued a policy of insurance, numbered 264,895, on certain property of the Indianapolis Cotton Manufacturing Company, against loss by fire, for the term of one year from the date of the policy, "loss, if any, payable to George B. Yandes, trustee for mortgage bondholders, as his interest may appear." By the terms of the policy it was to become void, "if, without the assent in writing or in print of the company, any change shall take place in title or possession."

On the same day, the defendant issued to the plaintiff the policy declared on. This policy was made by filling out the blank form used by the defendant in insuring property directly, and not the form used for reinsurance, and by attaching to the policy a slip, called a reinsurance slip. On this slip was the following: "$2500 on its [the Manufacturers' Insurance Company's] liability as insurers under its policy No. 264,895, issued at its Indianapolis agency to Indianapolis Cotton Manufacturing Company for $5000, as follows. [Then followed a description of the property.] This policy to be subject to the same risks, conditions, valuations, indorsements, privileges, assignments, and mode of settlement as are or may be assumed or adopted by the Manufacturers' Insurance Company, and the loss, if any, and expense of adjustment, payable *pro rata* at the same time and in the same manner as by said company. Other reinsurance permitted." On a blank space in the policy were written these words: "It is understood and agreed that the Manufacturers'

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Ins. Co. of Boston will retain at its own risk an amount upon this risk equal to this policy."

Then followed certain printed provisions, among which were these:

"1. If, ... without the consent of this company written hereon, ... the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or if the property insured be assigned under any bankrupt or insolvent law, or any change take place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree, or voluntary transfer or conveyance; or if this policy shall be assigned before a loss without the consent of this company indorsed hereon, ... this policy shall become void."

"3. When property has been sold and delivered or is otherwise disposed of, so that all interest or liability for loss thereon by fire or otherwise on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate."

"7. The use of general terms or anything less than a distinct specific agreement clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein."

The property insured was on October 27, 1884, the property of the Indianapolis Cotton Manufacturing Company. It was mortgaged for over $40,000 to George B. Yandes, trustee, as security for certain negotiable bonds.

The plaintiff's policy was taken out by said cotton manufacturing company, in accordance with a covenant in said bonds, to insure the property mortgaged for the benefit of the mortgagee, but this was never communicated to the defendant company, and the premiums were paid by said cotton manufacturing company. Prior to December 6, 1884, a suit was brought to foreclose said mortgage; and, in pursuance of a decree made in said suit, a foreclosure sale of said property was made on December 6, 1884. At this sale, the property was bid in by Henry Schnull, trustee, on behalf of the holders of the mortgage bonds aforesaid. The sum bid was less than the amount due under the mortgage. By the laws then in force in the State of

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Indiana, the purchase by Schnull vested the title to the property in him, subject to a right on the part of the Indianapolis Cotton Manufacturing Company to redeem the property mortgaged by paying the amount due upon the mortgage, with interest, within one year after the date of the sale. Upon December 6, the policy issued by the plaintiff was assigned by the cotton manufacturing company, with the consent of Yandes, to Schnull, as trustee, and said assignment of the policy, and the change in the title and possession of the property insured, stated above, were both duly consented to, in writing, by the plaintiff company, the written consent being indorsed on the back of the policy issued by the plaintiff, but were not known or consented to by the defendant company.

On December 27, 1884, the property insured was damaged by fire, under such circumstances as to create a liability on the part of the plaintiff company under its policy. Notice of the loss was given by the assured to the plaintiff company on December 29, 1884, and a statement in writing in regard to the loss, in the form required by the plaintiff's policy, and sworn to by the insured, was rendered to the company on January 6, 1885, and Schnull did all things necessary to entitle him to the payment by the plaintiff company of the loss under said policy. The total amount of insurance on said property, including the plaintiff's policy, was $30,000. The plaintiff company duly adjusted with Schnull the amount of damage to the property insured at the sum of $24,000, and it was agreed that the immediate loss and damage to the property insured, estimated according to the actual cash value of the property at the time of the loss was $24,000. The plaintiff's portion of the total loss, namely, $1000, was on January 9, 1885, paid by the plaintiff to Schnull, as trustee. The plaintiff incurred expenses in the adjustment of said loss, amounting to seventeen dollars and fifty cents, and these expenses were reasonable and proper under the circumstances.

Notice of the fire and loss was given by the plaintiff to the defendant on Monday, December 29, 1885, the same day on which the notice was given to the plaintiff by Schnull, and proofs of loss, as required by the defendant's policy, were duly rendered by the plaintiff, and received by the defendant at the

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Indianapolis office on January 10, 1885. The plaintiff retained, at its own risk, an amount equal to the defendant's policy. The plaintiff demanded from the defendant, on said January 10th, the payment of $2000, its proportion of the loss on the property insured, and $8.75, being one half the amount of the expenses incurred in the adjustment.

W. C. Loring, for the plaintiff.

H. D. Hyde, for the defendant.

KNOWLTON, J. The contract entered into by the defendant with the plaintiff differed materially from an ordinary contract to insure a general owner against damage to his property by fire. While in a sense it was an insurance upon property, it was strictly a contract of indemnity against risk under another contract which had been entered into by the assured. The assured was not the owner of the property at risk, and had no relation to it except as insurer under the original policy. In that relation it had an insurable interest in it, and could enter into any proper contract for the protection of that interest. *Eastern Railroad* v. *Relief Ins. Co.* 98 Mass. 420. But, manifestly, many provisions appropriate to an ordinary agreement with the owner of property for the insurance of it could have no proper application to the agreement made by these parties.

The defence relied on is that there was a change of title to the buildings and machinery referred to in the defendant's policy, and an assignment of the policy issued by the plaintiff upon them, and an assent by the plaintiff to that assignment, all without the consent of the defendant.

It appears upon inspection of the defendant's policy, and is agreed by the parties, that it was prepared upon a printed blank, commonly used in writing policies to insure against loss upon property by the owners of it. This blank contained stipulations making void the policy, if, without the written consent of the company, the subject of the insurance should be sold or transferred, or any change should take place in title or possession, or the policy should be assigned before loss; and these stipulations appear in the policy declared on.

It is often doubtful how far provisions which relate to the conduct of an assured person as general owner of that which is the subject of the contract should be given effect, in a policy to

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indemnify against a risk which the assured has taken upon the property of another. That can only be determined in a given case by a careful scrutiny of the different parts of the writing to ascertain its meaning. Whenever words are found in a contract which can have no proper application to the subject to which it relates, they cannot be regarded; and, not infrequently, the careless use of printed blanks compels recognition of this rule. The policy in this case contained many provisions which were originally intended to regulate the conduct of an owner in relation to his property before and after a possible fire. The nature of the risk against which it insured, if there were no special stipulation pertaining to it, would suggest troublesome questions with reference to the applicability of these provisions to this peculiar kind of insurance, some of which it might be necessary to decide. But, in connection with the statement of the risk, the following sentence was inserted, which relieves the case of this difficulty: "This policy to be subject to the same risks, conditions, valuations, indorsements, privileges, assignments, and mode of settlement as are or may be assumed or adopted by the Manufacturers' Insurance Company, and the loss, if any, and expense of adjustment, payable *pro rata* at the same time and in the same manner as by said company. Other reinsurance permitted."

By this language the defendant bound itself by what had been, and by what might be, assumed and adopted by the plaintiff, properly pertaining to the risk which it was reinsuring. This agreement rendered nugatory many printed portions of the policy in which it was inserted. This was special and peculiar, pertaining directly to the subject matter of the contract, and it controlled those parts of the policy which were inconsistent with it. It assumed knowledge on the part of the defendant of all the terms and conditions of the plaintiff's policy, and it implied that the plaintiff, as the original insurer, might properly "assume or adopt . . . . risks, conditions, valuations, indorsements, privileges, assignments, and modes of settlement," without materially changing the nature of the liability created by the original policy. It did not authorize the plaintiff to charge the defendant by the assumption of a new risk of a different character, or to materially enlarge the existing one. But it covered whatever an insurance

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company, in accordance with the general usage of such companies in like cases, would do, in the proper performance of its duty, for the continuation of the same risk, having due regard to the rights and interests of both insurer and insured.

The plaintiff consented to that which continued its liability under the policy which it had issued. When the trustee of the mortgage bondholders, to whom the policy was payable, took measures to foreclose his mortgage, and the property was bought under a judicial sale by an agent of these bondholders, there was a change of title, although the mortgagor under the law of Indiana still had a year in which to redeem by paying the mortgage debt. It was provided in the policy issued by the plaintiff, that a change of title not assented to in writing by the company should render the policy void. Thereupon, to continue the insurance, the plaintiff assented in writing to this change, and also to an assignment of the policy, made by a mortgagor to the purchaser at the judicial sale, who represented the bondholders, and who afterward held the policy in the same interest as the mortgagee had done, to whom it was at first made payable.

The only change which occurred was hardly more than a technical transfer of the legal estate. The validity of the policy was preserved by the plaintiff's indorsement of consent upon it. The defendant, in the sentence which we have quoted, expressly agreed that its policy should be subject to "indorsements" and "assignments" upon the plaintiff's policy, to be afterward "assumed or adopted" by the plaintiff. The language chosen was apt to cover what the plaintiff did, and fully justified it. The defendant, therefore, cannot now be relieved from liability on the ground that a change in ownership which did not affect the risk was assented to by the plaintiff to prevent a forfeiture.

This conclusion not only results from a proper construction of the language of the parties touching this subject, but is consistent with the manifest purpose and spirit of their contract. The defendant agreed to assume half the risk of the plaintiff upon the buildings and machinery insured. It was expressly agreed that the plaintiff should retain at its own risk an equal amount under its own policy. Both parties understood that an insurance company, to do a successful business, must deal equitably with its patrons, and hold itself in readiness to consent to

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changes in the situation and ownership of subjects of insurance which do not affect the risk, and which the necessities or convenience of policy-holders require. Contracts for reinsurance are properly made with reference to this recognized principle; and it is not unnatural that discretionary power should be given the original underwriter with reference to modifications of the contract which are commonly made, and which do not change its character. A partial guaranty for the proper exercise of that discretion may be obtained, as was done in this case, by requiring the reinsured company to continue to carry, on its own account, a part of the risk reinsured. The interests of all parties may be served, and their rights protected, by inserting in the contract a liberal provision, like that in the policy before us.

Courts of New York, and also of Maryland, in dealing with somewhat different questions under policies of reinsurance, have reached conclusions not unlike our own. *Jackson* v. *St. Paul Ins. Co.* 99 N. Y. 124. *Consolidated Ins. Co.* v. *Cashow*, 41 Md. 59. *Judgment affirmed.*

CHARLOTTE A. RING & another *vs.* PHŒNIX ASSURANCE COMPANY.

Suffolk. Nov. 14, 1887. — Jan. 3, 1888. DEVENS & W. ALLEN, JJ., absent.

A policy of insurance was issued, in the form prescribed by the Pub. Sts. c. 119, § 139, against loss by fire, upon chattels, while contained in a certain house "occupied the year around." A loss occurred in May, and during the previous October, and for a few days before and after, the house was unoccupied. The judge instructed the jury that the plaintiff must satisfy them that the building containing the property answered the description in the policy at the time when the contract was made and at the time of the fire, and the attention of the jury was called to the nature of the occupancy as a circumstance to be considered in determining whether the house could be called a building "occupied all the year around." *Held*, that the instructions were sufficiently favorable to the defendant, and that the action could be maintained.

Under the Pub. Sts. c. 119, §§ 138, 139, 181, a misrepresentation made in obtaining a policy of fire insurance is to be deemed material, if the matter misrepresented increases the risk of loss, although not made with intent to deceive.

HOLMES, J. The policy sued upon is a Massachusetts standard policy. Pub. Sts. *c.* 119, § 139. The "description of

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property insured" describes various chattels, "all while contained in the frame dwelling-house known as the 'Pebbly Beach House,' Bass Rocks, Gloucester, Mass., (on Ocean Avenue,) and occupied the year around." The judge instructed the jury that the plaintiffs must satisfy them that the building containing the property insured answered the above description at the time when the contract was made, and also at the time of the fire. The fire took place on May 4, 1884, and the attention of the jury was directed to the fact, that during the previous October, and for a few days before and after, the family in charge lived in the adjoining laundry building, and not in the house where the insured property was, as a circumstance to be considered by them in determining whether it properly could be called a building "occupied all the year around."

These instructions were sufficiently favorable to the defendant. Assuming that the jury could not have found that the break in October was of so trifling a nature as not to prevent its remaining a house "occupied all the year around," or that the house was occupied in October, and assuming also that the words quoted look to the future occupation of the house, and that the plaintiff could not have recovered for a loss while the house was unoccupied, the stipulation must be taken to have been satisfied if the permanent occupation was resumed so long before the fire that the temporary absence of an occupant plainly appears to have had no connection with the loss. *Hinckley* v. *Germania Ins. Co.* 140 Mass. 38.

The description is not a description of the insured articles, but of the house where they are contained; and although the introductory words, "while contained in," governing the whole clause, fairly enough may be held to confine the operation of the policy to such time as the articles are contained in a house answering to the whole of that description, we see no reason why they should do more than suspend the insurance while the articles are not contained in such a house. The fact that the house was unoccupied for a short time six months before the fire, can have no greater effect than removing the goods to safety deposit vaults would have done. In either case, we assume, the goods would not have been covered by the insurance for the time being; but it would be a startling proposition that in the latter

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case the insurers would have had a right to repudiate the policy after the goods had been brought back to the place mentioned in it.

After instructing the jury concerning the contract, the court proceeded to deal with certain representations made by one who, as the court stated, "was confessedly the authorized agent and representative of the plaintiffs." These were contained in a paper headed "Application for insurance," and in a letter and a plan accompanying it. Some of these representations were similar to the statements in the policy already discussed, and necessarily fell under consideration with the rest as representations. But all that was said plainly referred to the contents of these other papers, and did not qualify or change the instructions with regard to the stipulations of the contract.

So far as the occupation of the house was concerned, the representation seems to have been of no importance as such, since the clause was made a part of the contract, and the plaintiffs were held to the rules applicable to such a clause when part of the contract. *Goddard* v. *Monitor Ins. Co.* 108 Mass. 56, 59. But there was also a representation, not made part of the contract, that there were no houses within one hundred feet, which may not have been literally accurate, because the pool-room belonging to the house, but in a separate building, was not mentioned.

The jury were instructed to consider whether the facts stated were matters material to the risk, — "whether insurance companies are accustomed to charge more where there are wooden buildings near to that which they are about to insure" (*Luce* v. *Dorchester Ins. Co.* 105 Mass. 297, 301); if the facts were material, whether the representations were false; and, if false, whether the representations were made innocently and by mistake, and so fairly made. We are of opinion that there was error in putting the last question to the jury, and in thus allowing them to find for the plaintiffs if they had made misrepresentations on matters which increased the risk of loss, provided they had not been guilty of fraud.

It is true that the St. of 1864, *c.* 196, now the Pub. Sts. *c.* 119, § 138, enacts, with regard to fire insurance, that the application shall not be considered as a warranty or a part of the contract. But it seems to have been thought in *Eastern Railroad*

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v. *Relief Ins. Co.* 98 Mass. 420, 426, that this statute did not change the common law rule bearing upon this case, concerning representations forming the basis of a policy. *Kimball* v. *Ætna Ins. Co.* 9 Allen, 540, 542. *Campbell* v. *New England Ins. Co.* 98 Mass. 381, 390, 396. *Moens* v. *Heyworth*, 10 M. & W. 147, 157, 158. However this may be, the effect of the later St. of 1878, *c.* 157, now the Pub. Sts. *c.* 119, § 181, is, that, if the matter misrepresented increases the risk of loss, it still may defeat the policy, although not made with intent to deceive. The provision of § 138, that the application shall not be considered a warranty, means only that an inquiry into the effect of matters there represented upon the risk of loss shall not be cut off, and that substantial accuracy as to material facts shall be sufficient. Perhaps the rest of the section makes it more difficult to say, as in the decisions cited, that in case of a material misrepresentation there has been no agreement upon the subject matter of the contract, because that form of statement seems to imply that material representations are tacitly incorporated into the description in the contract of the property insured, and thus to bring the cases within the principles of *Goddard* v. *Monitor Ins. Co.*, *ubi supra*, *Gardner* v. *Lane*, 98 Mass. 517, *S. C.* 12 Allen, 39, and 9 Allen, 492, where there was a disagreement between the express words of the description and the designated object. But although misrepresentations which form no part of a contract in any sense, but merely offer motives for making it, commonly do not affect its validity unless fraudulent, it is perfectly possible to require the insured to see at his peril that his material statements are true, if it is thought politic to do so, because of the necessity which the insurer is under of seeking the information, and of getting it in that way. So the law stood after the St. of 1878, and probably before; *Eastern Railroad* v. *Relief Ins. Co.*, *ubi supra;* and whether it required a change in the mode of statement or not is unimportant for our present purposes. The substantive reasons which led to the common law rule are still recognized as in full force.

There has been no change in the law since, unless one was made by the St. of 1881, *c.* 166, now the Pub. Sts. *c.* 119, § 139, fixing the form of the standard policy. The material language is, "This policy shall be void if any material fact or

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circumstance stated in writing has not been fairly represented by the insured." Of course it is possible to read the word "fairly" as meaning "honestly," and as cutting down the effect of misrepresentations which form the basis of insurance to the single case of fraud. But it is just as possible to read the word as requiring a fair correspondence between the representation and the fact; and in view of the well-known reasons for requiring it to which we have referred, and of the fact that the St. of 1878 stands upon the statute-book in § 181 unmodified, although manifestly inconsistent with the former interpretation, we are of opinion that this latter reading must be adopted.

Exceptions sustained.

A. Russ & J. D. Bryant, for the defendant.

L. W. Howes, for the plaintiffs.

COMMONWEALTH *vs.* JAMES W. CROWLEY.

Suffolk. Nov. 21, 1887. — Jan. 3, 1888. DEVENS & W. ALLEN, JJ., absent.

A person who keeps open a shop on the Lord's day for the purpose of selling therein bread and pastry, not made by him, but bought for the purpose of resale, is not a "baker," within the meaning of that word in the St. of 1886, *c.* 82, although he has a small stove in his shop in which his wife sometimes bakes a few cookies or ginger-snaps, which he sells; and he may be convicted, under the Pub. Sts. *c.* 98, § 2, of keeping open his shop for the purpose of doing business therein.

COMPLAINT on the Pub. Sts. *c.* 98, § 2, alleging that the defendant, at Boston, on March 13, 1887, that day being the Lord's day, kept open his shop "for the purpose of doing business therein, the same not being then and there works of necessity or charity."

Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows:

The defendant testified that on Sunday, March 13, 1887, between the hours of eight and nine o'clock in the forenoon, he kept open a shop, situated on Cambridge Street in Boston, and of which he was the proprietor, for the purpose of selling therein,

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on said day, bread, pastry, and milk; that he also had in said shop certain groceries and fancy articles which he sold on other days, but not on Sunday, and that he did not keep his shop open for the purpose of selling these last-mentioned articles on said Sunday; that he did not make, or cause to be made, the bread and pastry which he was thus selling and intending to sell, but bought the same from time to time of other persons, for the purpose of reselling, as he did also the milk sold by him; and that milk was usually sold by bakers of Boston to their customers.

The defendant further testified that he had a small stove in the rear part of his shop in which his wife sometimes baked a few cookies or ginger-snaps, which he placed in his show-cases and sold with the bread and pastry.

The government offered no evidence tending to control the defendant's testimony.

The defendant requested the judge to submit to the jury the question, whether, upon the foregoing testimony, the defendant was a "baker," within the St. of 1886, *c.* 82, but the judge declined so to do, and instructed the jury that, if they believed the testimony of the defendant to be true, they might return a verdict of guilty.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. B. Loud, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

KNOWLTON, J. Section 2 of the Pub. Sts. *c.* 98, which forbids keeping open one's shop on the Lord's day, or doing "any manner of labor, business, or work, except works of necessity and charity," was amended by the St. of 1886, *c.* 82, which provides that "this section shall not apply to sales by bakers, between the hours of six and ten o'clock in the forenoon and four and half-past six o'clock in the afternoon, of bread and other articles of food usually dealt in by them."

The refusal of the judge to rule as requested, taken in connection with his instruction to the jury, that, "if they believed the testimony of the defendant to be true, they might return a verdict of guilty," we understand to have been merely a refusal to leave the jury uninstructed as to the meaning of the word "baker" as used in the statute, and not an interference with

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their right to pass upon all the questions at issue between the parties.

In this view, the only question in the case is whether, upon the defendant's own testimony, he was a baker, within the meaning of the amendment. There is nothing to indicate that this word is used in any other than its ordinary signification. A baker is one whose occupation is to bake bread and other articles of food. The statute which we are considering may be presumed to have been founded upon the desirability and propriety of permitting freshly cooked food to be obtained on the Lord's day, as well from the shop of the manufacturer as from the kitchen of the householder. That the interval may be short between the preparation of the food and the appearance of it on the table of the consumer, the baker is permitted to do his work, and deliver his viands, on the Lord's day. But this reason does not apply to sales of provisions which do not require preparation by the dealer for the immediate use of the purchaser. We cannot believe that the Legislature intended to include in the exception of the amendment all persons who deal in the products of bakeries. Such a construction of the statute would allow a large proportion of the grocers and provision dealers of the Commonwealth to open their shops every Lord's day.

The defendant was not a baker in any sense. He kept a shop for the purpose of selling groceries, fancy articles, bread, pastry, and milk. He did not make or cause to be made the bread and pastry which he sold, but bought it from time to time from other persons. The fact that he had a small stove in the rear part of his shop, in which his wife sometimes baked a few cookies and ginger-snaps, which he placed in his show-cases and sold with the bread and pastry, was not of such importance as to characterize his business, or warrant the jury in finding that he was a baker. *Exceptions overruled.*

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THOMAS TURNER *vs.* FITCHBURG RAILROAD COMPANY.

Franklin. Sept. 27, 1887. — Jan. 4, 1888. C. ALLEN & HOLMES, JJ., absent.

A private right of way across the location of a railroad may be acquired by prescription, notwithstanding the St. of 1853, *c.* 414, § 4, (Pub. Sts. *c.* 112, § 195,) imposing a penalty on any person who, without right, knowingly stands or walks on any railroad track, and the St. of 1874, *c.* 372, § 151, (Pub. Sts. *c.* 112, § 198,) imposing a penalty on a person who, without the consent of the corporation, rides or drives a horse on a railroad.

In an action against a railroad corporation for obstructing a prescriptive right of way across the location of the defendant, it is no defence that, after the way was used, a statute was passed allowing the corporation to relocate its road, and for that purpose, under proper proceedings, to take lands, in the absence of evidence that such proceedings were had.

On the issue whether a right of way by prescription has been acquired over the location of a railroad corporation, an agreed statement of facts stated that the plaintiff and his grantors had used the way openly, adversely, and uninterruptedly for more than twenty years. *Held*, that the court might assume that the defendant had knowledge of the acts of user.

In an action against a railroad corporation for obstructing a right of way claimed to exist by prescription over the defendant's location, the declaration alleged that the defendant erected a fence across the way, and placed upon the way stones, earth, gravel, ties, and iron rails. The case was submitted to the court on agreed facts, which stated that the acts of the defendant declared on were done upon its land "in the construction and maintenance of its railroad, which it was authorized by law to construct and maintain." *Held*, that this was not to be construed to mean that the acts done by the defendant were done as a part of the necessary repair of its road.

TORT. Writ dated December 8, 1886. The declaration alleged that the plaintiff owned two tracts of land in Orange, the first bounded south by land of the defendant, and north by the highway leading from said Orange to Erving, and the second bounded south by Miller's River, and north by land of the defendant; that the south side of the first described tract of land and the north side of the second are bounded by the defendant's land, on which are the roadbed and track of the defendant's railroad; that there was a way leading from the first described tract of land over the land of the defendant to the plaintiff's second lot of land, which the plaintiff had a right to use as a footway and a carriageway; that the defendant erected a fence across

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said way, filled it with, and placed upon the same, stones, earth, gravel, ties, and iron rails, so that the plaintiff could not use the same as a carriageway, and only with great difficulty as a footway, and by reason of obstructing his right of way as aforesaid the market value of the plaintiff's second tract of land had been greatly decreased, and the plaintiff had been put to great expense, inconvenience, and damage in cultivating said land and harvesting the crops grown thereon. The answer contained a general denial, and alleged that all the acts committed by the defendant were upon the soil and freehold of the defendant, and upon its roadbed and track, and were such as its charter and the rights obtained thereunder permitted it to do.

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, on agreed facts, in substance as follows:

On January 12, 1849, the tracts of land described in the plaintiff's declaration, and the tract of land between the same, owned by the defendant, over which said right of way is claimed, were owned by one Rodney Hunt of Orange, and formed one continuous tract of land. On said January 12, 1849, said Hunt, by warranty deed, conveyed in fee to the Vermont and Massachusetts Railroad Company the tract of land now lying between the plaintiff's two tracts of land, over which said right of way is claimed. This deed described the land by metes and bounds, and following the description were these words: "The above consideration includes all damage done to my adjoining land in the construction of said railroad by said corporation."

The defendant is now rightfully in possession of said land, through conveyance from the Vermont and Massachusetts Railroad Company, and the same has been occupied and used as a railroad continuously since 1849. On July 31, 1874, the plaintiff became possessed of the two tracts of land described in his declaration by a deed of warranty from one Patrick H. McCushing, the said McCushing holding title under one Howe, to whom said Hunt had granted said tracts, the possession of the said Hunt, Howe, McCushing, and the plaintiff being continuous and without interruption. All of the defendant's acts declared on occurred between July 1, 1880, and July 1, 1885, and were done upon its said described tract of land in the construction and maintenance

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of its railroad, which it was authorized by law to construct and maintain.

The second described tract of land is bounded continuously on the north by land of the defendant, as set forth in the declaration, and on the south is bounded continuously by Miller's River, so called, a stream of water varying in width from one hundred to one hundred and fifty feet, and there is no approach to said tract either from the east or west, excepting over the land and track of the defendant. There is no bridge or other means of getting over said river, and the only access had by the plaintiff to and from said described tract of land is over the land of the defendant. The plaintiff does not own any land south of said river, which is separated from the nearest public highway, south, by a tract of land about half a mile wide, mostly covered with an unbroken forest. The plaintiff and his grantors have used said right of way openly, adversely, and uninterruptedly for more than twenty years prior to the acts of the defendant declared on.

C. F. Perkins & A. M. Lyman, for the plaintiff.

G. A. Torrey, for the defendant.

DEVENS, J. The plaintiff and those under whom he claims have used a right of way "openly, adversely, and uninterruptedly" across the railroad of the defendant for more than twenty years prior to the acts of the defendant declared on. The most important question which the parties have presented is whether, under the statutes as they now exist, a private right of way by prescription can be acquired by an individual over the location of a railroad corporation. That such a right of way may be acquired by reservation, by grant, or by agreement of parties, is well established. *Boston Gas Light Co.* v. *Old Colony & Newport Railway*, 14 Allen, 444. *Gay* v. *Boston & Albany Railroad*, 141 Mass. 407. If such a right might be thus acquired, there would be nothing inconsistent in holding that it might be acquired by prescription, and that twenty years' adverse user would be evidence of a grant thereof. In *Fisher* v. *New York & New England Railroad*, 135 Mass. 107, it was held that the St. of 1861, *c.* 100, (Pub. Sts. *c.* 112, § 215,) which in substance provides that no length of possession or occupancy of land of a railroad corporation by an abutter shall create a right in such land

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to the abutter, would not prevent him from acquiring a right to a private way across the railroad by a twenty years' user thereof.

That which the defendant urges as the strongest argument against the plaintiff's having acquired a prescriptive right to cross the railroad track is, that, in order to have done so, he and his grantors must have continuously violated the Pub. Sts. *c.* 112, §§ 195, 198, and that such violations could confer no rights on the violator. Section 195, imposing a penalty on any person, "without right, knowingly," walking or standing on any railroad track, is first found in the St. of 1853, *c.* 414, § 4. Since that time it has been decided that, in the case of a public way, such a right may be acquired by prescription, although the effect of this section of the statute was not discussed. *Fitchburg Railroad* v. *Page*, 131 Mass. 391. There are intimations also, since the St. of 1853, that a private way may be thus acquired. *Gay* v. *Boston & Albany Railroad*, *ubi supra*. *Wright* v. *Boston & Albany Railroad*, 142 Mass. 296. *Deerfield* v. *Connecticut River Railroad*, 144 Mass. 325. Section 198 makes it a penal offence to ride or drive a horse, without consent of a railroad corporation, on its road. The defendant contends that, under these sections, rights cannot be acquired by prescription, against another or his property, by acts done in violation of the absolute prohibition of a public statute, that such acts where expressly prohibited are illegal in their inception and continuance, and cannot become lawful, as against individual members of the public, however long they may have been exercised. It is urged that, "when a statute forbids anything to be done, the right to do it is not to be granted or acquired." This contention, apparently drawn from the case of *Brookline* v. *Mackintosh*, 133 Mass. 215, 225, is there applied to a claim of a prescriptive right to defile a stream of water by pouring into it deleterious substances contrary to law, which right it was not in the power of any one to grant. Such an act, for public reasons, was one expressly prohibited to all. The argument has no proper application where the act done is or is not lawful according as it may have been done by right or with the consent of the party claiming to be injured, or as it may have been done against right or without such consent. The acts forbidden by §§ 195, 198, are so only when done without

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consent, but they may be permitted by the railroad corporation. The right to maintain a private crossing is also one which the railroad might grant, and to which it could give consent. The acts done in assertion of such a right, or by virtue of such an alleged consent, are not to be treated as originally wrongful, when they have been continued over twenty years, and when the party affected thereby has acquiesced for that length of time.

The defendant further urges, that it is impossible to gain a right of way over a railroad in actual operation, as the land of the railroad would be subject to the easement of the plaintiff, who might make use of it at his own pleasure. The case does not require us to define the exact limits of the right which the plaintiff has acquired. But it does not follow that, even if he has an easement, it is not one which he is compelled to exercise, subject to the superior right of the railroad corporation to run its trains, as it may determine to be proper for the general business of its road. There certainly may be an easement which will permit a way to be used only at particular times or seasons, or for particular purposes. As there may be by grant a right to cross a railroad when the trains of the corporation are not passing, so such a right may be acquired.

It is contended that the defendant has, under the St. of 1874, c. 401, a right to take lands for railroad purposes; that "lands" includes rights of way; and that, if the plaintiff's rights are interfered with, his remedy is by application to the county commissioners. This statute gives to the defendant a right to relocate its railroad, and for that purpose, upon proper proceedings, to take other lands than those thus occupied by it; but the case affords no evidence that such proceedings have been had, nor does it appear that the agreed statement of facts was intended to bring any such question before us.

It must be assumed that the defendant had knowledge of the acts of the plaintiff, as they were open and adverse, although such knowledge is not stated, in terms, in the statement of facts. The statement also fails to show precisely what the acts of the defendant were, although it refers to them as those declared on. These are alleged in the declaration to have been the erection of a fence across the way used by the plaintiff, filling and placing

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upon it stones, ties, gravel, and iron rails, so as to render it impassable as a carriageway, and with great difficulty as a footway. The statement finds that the acts done by the defendant were done "in the construction and maintenance of its railroad, which it was authorized by law to construct and maintain." If the meaning of this is that the acts done by the defendant were done as a part of the necessary repair of its road, and were appropriate for that purpose, and that interference with the plaintiff's way was necessarily incidental to such repair, there would be strong ground to argue that the plaintiff had, and could acquire, no right which interfered with this, and that such a right of the defendant was necessarily superior to any which the plaintiff could have acquired. But an examination of the whole facts, taken in connection with the arguments submitted,* leads us to the conclusion that the obstacle to the plaintiff was a permanent one, that its purpose was simply to deprive the plaintiff of the use of the way, and that it was in no other sense an act done in the maintenance of its road by the defendant.

We have not found it necessary to consider whether the plaintiff was entitled to a way by necessity.

Judgment affirmed.

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* The argument of the defendant on this point was as follows: "Even if the plaintiff has succeeded in showing that he was entitled to a right of way across the railroad, he has not shown that the railroad company has unlawfully interfered with the same. The railroad company has a perfect right to use the whole location for railroad purposes, and for constructing the necessary tracks, buildings, and other structures thereon. *Boston Gas Light Co.* v. *Old Colony & Newport Railway*, 14 Allen, 444."

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RICHARD GIROUX *vs.* PHINEAS STEDMAN & another.
MARY GIROUX *vs.* SAME.
JOSEPH PECORD *vs.* SAME.
MARY GIROUX *vs.* SAME.

Hampden. Sept. 27, 1887. — Jan. 4, 1888. C. ALLEN & HOLMES, JJ., absent.

If a farmer, not a dealer in provisions, kills a hog and sells it, knowing that the purchaser intends to eat it, there is no implied warranty on the seller's part that the hog is fit for food.

FOUR ACTIONS OF TORT. The declaration in the first case was as follows: "And the plaintiff says the defendants solicited him to purchase from them a certain quantity of meat to be used as and for provisions for himself and others; that said meat was unwholesome, corrupted, tainted, and unfit to be used as provisions; that said defendants, well knowing said meat to be unwholesome, tainted, and corrupted, and unfit and improper meat to be used as provisions, were bound to give the plaintiff notice and information of said unfit, unsafe, and tainted condition of said meat, and were bound to tell the plaintiff that said meat was improper meat to be used as and for provisions for himself and others. But said defendants improperly, negligently, and wrongfully failed and neglected to give the plaintiff such notice or information, and failed and neglected to tell the plaintiff that said meat was improper to be used for provisions, and the plaintiff purchased said meat and ate thereof and was made sick thereby for a long period of time, to his great damage." The declaration in each of the other cases was similar. The answer in each case was a general denial.

Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, which, after stating that the pleadings formed a part thereof, proceeded in substance as follows:

The plaintiffs claimed to have purchased from the defendants certain provisions, namely, certain quantities of dressed pork; that said pork was tainted and unfit for food; and that they ate of said pork and were made sick thereby.

The evidence showed that the defendants were farmers carrying on a farm in Chicopee, and jointly interested in raising pigs;

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that, about the middle of September, 1885, the defendants found that an infectious disease, known as hog cholera, existed upon their farm, and that their entire herd had been exposed to the disease; that on October 3, 1885, the defendants killed two of their hogs, dressed them, and sold one half of one of them to the plaintiff Richard Giroux, and one half of the other to the plaintiff Joseph Pecord; and that, on October 5, the defendants killed and dressed two other hogs, one of which was sold to the plaintiff Pecord.

The evidence showed further, that, at the time of the several sales to the plaintiffs, no representations as to the quality of the meat were made, and no notice was given to the plaintiffs, at the times of the sales, of the existence of the disease among the herd owned by the defendants; but it appeared that the defendants knew at the time of the several sales to the several plaintiffs that the meat so sold by them to the plaintiffs was to be used by the plaintiffs for provisions.

There was evidence tending to show that, although the defendants' whole herd of swine had been exposed to the aforesaid disease, yet that some of the herd were not in fact diseased; and there was also evidence tending to show that an animal might be infected with the said disease, and the meat of such animal would not necessarily, for that reason, be unwholesome and unfit for food.

The judge instructed the jury as follows: "At common law, the general rule is, that where personal property is sold in the presence of the buyer and seller, each having an opportunity to see the property, and there is nothing said about the quality, the only implied warranty on the part of the seller is that he has a valid title to, or has a right to sell, the chattel. In the case of a provision dealer or marketman selling meat, flour, or vegetables to his customers, there is an exception to this general rule; the law presumes that the marketman or provision dealer knows whether the provisions he sells are in a condition fit for use, and, knowing what use his customers are to make of the articles sold, the law implies a warranty on the part of the seller, although he does not say anything, that the food is wholesome."

The judge further instructed the jury as follows: "This exception to the general rule does not apply in these cases, for the

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reason that the defendants are farmers, and not provision dealers or marketmen. And the plaintiffs are not entitled to prevail in these cases, if they have failed to prove the allegations in their declarations, that the defendants knew that the meat sold by them to the plaintiffs was unwholesome and improper meat to be used as provisions."

Other and full instructions were given.

The jury returned a verdict for the defendants; and the plaintiffs alleged exceptions.

W. W. McClench, for the plaintiffs.

E. W. Chapin, for the defendants.

DEVENS, J. It was known to the defendants that the plaintiffs purchased the meat to be used as provisions, but it was held by the presiding judge that, in order that they should recover, they must prove the allegations in their declarations, that the defendants knew that the meat sold by them was unwholesome, and improper to be used as provisions. He instructed the jury that, at common law, the general rule is, that where personal property is sold in the presence of buyer and seller, each having an opportunity to see the property, and there is nothing said as to the quality, the only implied warranty on the part of the seller is that he has a valid title in, or has a right to sell, the chattel. He added, that there is an exception to this general rule where a provision dealer or marketman sells provisions, as meat and vegetables, to his customers for use, and that in such case there would be an implied warranty that they were fit for use and wholesome.

Whether this exception exists or not, it is not important in the case at bar to inquire, as it cannot be, and was not, contended that the defendants were brought within it. The contention of the plaintiffs is, that, even if the rule is well established that, where there is no express warranty and no fraud, no warranty of the quality of the thing sold is implied by law, and that the maxim of *caveat emptor* applies, there is a more general exception which excludes from its operation all sales of provisions for immediate domestic use, no matter by whom made.

That in a sale of an animal by one dealer to another, even with the knowledge that the latter dealer intends to convert it into meat for domestic use, or that in the sale of provisions in

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the course of commercial transactions there is no implied warranty of the quality, appears to be well settled. *Howard* v. *Emerson*, 110 Mass. 320, and cases cited. *Burnby* v. *Bollett*, 16 M. & W. 644. While occasional expressions may be found, as in *Van Bracklin* v. *Fonda*, 12 Johns. 468, which sustain the plaintiffs' contention, we have found but one decided case which supports it. In *Van Bracklin* v. *Fonda*, *ubi supra*, it is said that in a sale of provisions the vendor is bound to know that they are sound, at his peril, but the case shows that the defendant, who had sold beef for domestic use, knew the animal from which it came to be diseased. This had been found by the jury, and the remark is made in connection with the facts proved.

The case of *Hoover* v. *Peters*, 18 Mich. 51, does sustain the plaintiffs' contention, as it is there held that, where articles of food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose, whether the sale be made by a retail dealer or by any other person. This case imposes a heavier liability on a person not engaged in the sale of provisions as a business than he should be called on to bear. The opinion is not supported by any citation of authorities. In a dissenting opinion by Mr. Justice Christiancy it is said, "Had it appeared that he [the defendant] was the keeper of a meat market or butcher's shop and was engaged in the business of selling meat for food, and therefore bound or presumed to know whether it was fit for that purpose, I should have concurred in the opinion my brethren have expressed." If there is an exception to the rule of *caveat emptor* which grows out of the circumstances of the case and the relations of buyer and seller, where the latter is a general dealer and the former a purchaser for immediate use, there appears no reason why it should be further extended.

In the case at bar, the defendants were not common dealers in provisions, or marketmen. They were farmers selling a portion of the produce of their farms. No representations of the quality of the meat sold was made by them. In making casual sales from a farm of its products, to hold the owner to the duty of ascertaining at his peril the condition of the articles sold, and

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of impliedly warranting, if sold with the knowledge that they are to be used as food, that they are fit for the purpose, imposes a larger liability than should be placed upon one who may often have no better means of knowledge than the purchaser.

The plaintiffs contend that the case of *French* v. *Vining*, 102 Mass. 132, is decisive in their favor, but it appears to us otherwise. In that case the defendant sold hay, which he knew had been poisoned, for the purpose of being fed to a cow, although he had carefully endeavored to separate the damaged portion from the rest, and supposed he had succeeded. From the effects of eating the hay the cow died, and the defendant was held liable. His knowledge of the injury to the hay was certain and positive; his belief that he had remedied the difficulty was conjectural and uncertain, and proved to be wholly erroneous.

In the case at bar, while the defendants' herd had been exposed to hog cholera, there was evidence that a portion of it only had been affected, and further, that, even if affected, the meat of the animals was not necessarily unwholesome. There was no evidence that the animals whose meat was sold had ever, so far as the defendants knew, actually had the disease; and the verdict of the jury has established that they were ignorant that the meat sold by them was unwholesome.

In *French* v. *Vining*, the defendant knew what the condition of the hay had been, and this is a vital part of the case. He sold an article which he knew had been poisoned, and from which he had taken no effectual means to remove the poison. His belief or supposition that his effort had been successful could not relieve him from liability for the consequences that ensued because it had been unsuccessful, if he sold the hay without informing the purchaser of the dangerous injury which it had received.

Exceptions overruled.

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First National Bank of Northampton *vs.* Josephus Crafts, assignee.

Same *vs.* Hampshire County National Bank & another.

Hampshire. Sept. 29, 1887. — Jan. 4, 1888. Morton, C. J., C. Allen & Holmes, JJ., absent.

If an assignee in insolvency sells, by leave of the Court of Insolvency, the estate of the insolvent, and, acting through a third person, becomes the purchaser, and manages the estate for his own benefit and for the benefit of other persons, this court will not entertain a bill in equity, brought by a creditor of the estate against the assignee, under the Pub. Sts. *c.* 157, § 15, to revise an order of the Court of Insolvency dismissing a petition of the creditor seeking to compel the assignee to account for the profits made by him after the sale, unless the persons interested with the assignee in the purchase are made parties.

If a creditor of an insolvent estate proves a valid claim against it, the fact that he subsequently participates with the assignee of the estate in a transaction prejudicial to the rights of the creditors affords no ground for expunging his claim, under the Pub. Sts. *c.* 157, § 35.

Devens, J. These cases are two bills in equity, seeking the supervisory intervention of this court over the Court of Insolvency, and are in the nature of appeals from its decisions. Pub. Sts. *c.* 157, § 15.

In the first case, the plaintiff seeks that the account of the assignee of the insolvent estate of N. Day and Brothers should be surcharged, and that he be denied any compensation as assignee, on the ground that he has wrongfully withheld from the general creditors large sums of money belonging to the insolvent estate, and has unlawfully gained and secured them for his own benefit, and for that of the Hampshire County National Bank.

In the second case, the plaintiff seeks that this court shall order that the proof of the claim of the Hampshire County National Bank as a creditor of N. Day and Brothers, heretofore made, shall be expunged.

Without undertaking to state the facts in their complete details, they may be summarized from the allegations of the pleadings and the report of the master sufficiently for the immediate purpose of the present inquiry. N. Day and Brothers became embarrassed in the summer of 1884, and were largely and nearly

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equally indebted to the plaintiff and to the Hampshire County National Bank on promissory notes regularly discounted. Before proceedings in insolvency were begun, these banks conferred as to making further advances, determined that it was unwise to do so, and the insolvency of N. Day and Brothers followed. Crafts was a director of the Hampshire Bank, was present at this conference, and was subsequently chosen assignee, on August 30, 1884. On October 20, 1884, Crafts, as assignee, filed his petition for leave to sell all the property of the insolvents for the sum of $41,500, at private sale, except certain pieces of real estate mortgaged for more than their value. The price offered for that which was proposed to be sold slightly exceeded its appraised value. This petition was supported by fifteen of the creditors, including the Hampshire Bank, and was opposed by the plaintiff, but on November 15 was granted. It was represented to the court that this offer was made by Charles Day and William C. Hall. Charles Day was a brother of the insolvents, was tenant in common of several pieces of real estate used by them in their business, but was not a partner or otherwise interested therein. Before this leave was granted, he also relinquished any claim against the insolvents, if any he had, for the use made by them of his share of the real estate.

On November 10, 1884, Charles Day had a conference with Luther Bodman, the president of the defendant bank, relative to a loan of $27,000 or $28,000, to enable him to purchase the property which the assignee had petitioned for leave to sell. It was finally arranged that the Hampshire Bank should lend $27,000 or $28,000, and that the property should be conveyed to a trustee to be used to repay this loan, and for other purposes, which appear in a declaration of trust which was made on November 15, the day when leave to sell was granted. It was also then arranged that Crafts should be the trustee. On November 15, 1884, Crafts, as assignee, acting under the authority given by the Court of Insolvency, conveyed to Charles Day and Hall all of the property, real and personal, except the five lots heretofore mentioned, and said Day and Hall reconveyed the same to Crafts, for the purposes set forth in the declaration of trust. This declaration recited the conveyance to Crafts of all the real and personal estate of the insolvents, and also a conveyance of all the interest of Charles

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Day in their real estate, and also that Charles Day had given to Crafts, as trustee, his negotiable note for the sum of $5000, and that Crafts had given his note to the Hampshire Bank for $27,000, lent to him in order to carry out the trust. The declaration further stated, as the purpose of the trust, that Crafts should have power to manage all the estate, and carry on the business for the best interest of those concerned, should sell or convey the same, and should devote the proceeds, first, to the payment of the sum of $27,000 borrowed from the bank, provided that the note of $5000, given to him by Charles Day, should not be collected, except so far as Crafts might fail to realize, from the property conveyed, what was necessary in order to pay the loan made to him from the Hampshire Bank. Secondly, Crafts was to pay to the Hampshire Bank seventy-five per cent of the debt due to it from the insolvents, and proved by it, deducting therefrom the amount of any dividends which it might receive in the insolvency proceedings. Thirdly, if any property remained, it was to be transferred or paid to Charles Day. Charles Day gave to Crafts his note for $5000, and a quitclaim deed of his undivided interest in the lots he had owned in common with his brothers.

Crafts entered upon the management of this estate, and has carried on the business of farming, brickmaking, and manufacturing lumber, making the necessary disbursements therefor. He has sold certain parts of the property, and has paid to the Hampshire Bank a portion of the sum borrowed from it. He is alleged to have conducted the business successfully; so that, estimating the value of the property now in his hands, and charging him with what he has received, and the fair value of the property when he received it, it is alleged that he has made a profit in the transaction, for which the plaintiff contends that he should now account as assignee.

The bill, in substance, seeks to set aside the whole transaction by which Crafts became trustee, and to appropriate to the benefit of the general creditors all the property which passed to him by the sale made to him, together with the profits thereon. He certainly is not bound to account for this property as assignee, nor for any profits arising from the transaction by which the property passed into his hands as trustee, unless the transaction

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itself was fraudulent and voidable by the general creditors. This cannot be investigated between himself and the creditors alone, but those must be made parties whose interests are directly concerned. The interest of Charles Day in this matter is direct. He does not appear to have been made a party to the original proceeding in the Court of Insolvency, on which the bill is founded, in which it was sought to charge Crafts on account of the receipt of moneys and other property, or of profits made thereon, which, as alleged, ought properly to belong to the estate; nor has he been made a party to the bill in this case.

All parties interested in the object of a suit should, as a general rule, be made parties thereto. Story Eq. Pl. § 72. Calvert on Parties, *c.* 1, § 1. In suits concerning trust property the *cestuis que trust* are necessary parties. This is especially so where the inquiry as to the rights of the trustee involves the necessity of investigating the relations between him and the *cestuis que trust*. *Boyden* v. *Partridge*, 2 Gray, 190. While the object of the court is to do justice to all parties interested in the subject matter of a suit, if complete justice can be done to those immediately before the court, other parties may, in its discretion, be dispensed with. *Jewett* v. *Tucker*, 139 Mass. 566. But where it is seen at the final hearing that justice cannot be done on account of a want of parties whose interests are involved in the controversy, this objection may then be made, or the court may of its own motion decline to proceed to a final decree, and may dismiss the bill. *Sears* v. *Hardy*, 120 Mass. 524.

The position in which Crafts stands in reference to the insolvent estate cannot be determined without passing upon the relation which he occupies to Charles Day, and upon the rights of Day if he has a direct interest in the transaction sought to be inquired into, and, practically, set aside. In such case, for the protection both of Crafts and of Day himself, and for a full investigation, it is necessary that Day should be made a party. That Day has such an interest by virtue of the declaration of trust, and the acts which were done in connection with it, is apparent. He was one of the purchasers under the sale made by order of the Court of Insolvency, subsequently transferring his purchase to Crafts as trustee. When the order was made, he relinquished a claim, whether real or pretended we are not

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now called on to decide, which he had against the insolvent estate. He transferred to Crafts his interest as tenant in common with the insolvents in certain portions of the real estate, and Crafts has since managed it with the other real estate formerly of the insolvents. Day also became responsible in the sum of $5000 for the payment of the loan agreed to be made to Crafts, and which was in fact afterwards made to him, to enable him to carry out the purposes of the trust, which loan has been only partially paid. He is finally entitled, under the declaration of trust, to receive whatever shall remain after Crafts has paid all expenses, and otherwise completed the execution of his trust.

It would be premature now to discuss whether a bill can be brought, founded upon the interlocutory order of the Court of Insolvency, — whether the investigation of such a transaction as the bill describes should be made upon a bill framed upon the supervisory power of this court in insolvency proceedings, — or whether an original bill should be brought to set aside the transaction, to which all interested should be made parties. The discussion of these, as well as of numerous other important questions, suggested by the pleadings and the master's report, must be postponed until Charles Day is made a party to the proceedings.

Similar considerations, which it is unnecessary to state in detail, apply to the Hampshire Bank, which has not been made a party defendant.

The plaintiff may move before a single justice to make Charles Day and the Hampshire Bank parties defendant, and to make such other amendments to his bill, if any, as he shall be advised will bring the inquiry he desires to present properly before the court, which motion may be then considered. If such motion is not made within a reasonable time, the bill must be dismissed.

Ordered accordingly.

The bill in the second case involves a different subject of inquiry. We assume, in considering this case, in favor of the plaintiff's contention, without in any way intending so to decide, that the transaction by which the property of the insolvent estate was sold, and finally passed into the hands of Crafts in trust, the defendant bank advancing to him the sum of $27,000 for the

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purpose of carrying out the objects of his declaration of trust, was one which was fraudulent in law, and which, by proper proceedings, through the assignee or otherwise, might be avoided by the creditors, and the property conveyed, and any profits made in the sale or management of the same, appropriated to the benefit of the creditors. If this be so, the plaintiff contends that an order should now be made that the proof of the claim of the defendant bank should be expunged. It has made application to the Court of Insolvency by petition to that effect, which petition has been refused, and it is upon this refusal that the bill before us, invoking the supervisory power of this court, is founded.

Having sought to obtain an advantage over other creditors in the payment of its claim, and to prevent an equal division of the property of the insolvents by the conveyance thereof to Crafts through Day and Hall, upon the trust heretofore stated, the plaintiff urges that the claim "proved by said Hampshire Bank ought to be expunged, for that it is founded in fraud and illegality." But the case shows that the claim proved by the Hampshire Bank was honestly due, nor is there any evidence that it had received any conveyance by way of preference or security, or that the claim was in any way diminished by any payment. Under certain circumstances, the Court of Insolvency has power to expunge a claim, or may alter it, as where "the evidence shows that it is founded in whole or in part in fraud, illegality, or mistake." Pub. Sts. *c.* 157, § 35. If the defendant bank has participated in a transaction prejudicial to the rights of creditors, and in fraud of the insolvent law, of such a character that it may be avoided by them, or may afford ground for an action in which a remedy may be sought in damages commensurate with the wrong inflicted, it is a transaction subsequent to the proof of its claim, and having no connection with such proof. The original claim is not the less valid. It is not founded in fraud or illegality because the bank may have subsequently done something which is justly the subject of animadversion, which may expose it to a demand for damages, or which may cause property which has been transferred for its benefit to be reclaimed. It would be to inflict a punishment purely arbitrary to expunge a claim in itself entirely honest and

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correct, on any such ground. We can find no warrant for doing so on any general legal principle, or by virtue of any provision of the statute. *Bill dismissed.*

W. S. B. Hopkins, for the plaintiff.

D. W. Bond & G. Wells, for the defendants.

CHRISTOPHER ABBOTT *vs.* NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

GEORGE EDWARDS *vs.* SAME.

ELIZABETH COMSTOCK *vs.* CHARLOTTE P. CHAMBERLAIN.

WILLIAM COMSTOCK *vs.* WILLIAM EDWARDS.

Worcester. Oct. 5, 1887. — Jan. 4, 1888. C. ALLEN & KNOWLTON, JJ., absent.

Under the Gen. Sts. *c.* 63, § 45, providing that, after a railroad "corporation has by virtue of its charter taken land or other property for the purpose of its road, it shall, before proceeding to construct the road, furnish a plan of the land to the owner," and that, if such plan is not so furnished, all the rights of the corporation to enter upon or use such land, except for making surveys, shall be suspended until it has delivered a plan, the failure to deliver a plan of land taken does not invalidate the taking; and a person whose land has been taken cannot, after the road has been completed and has been in use for nearly twenty years, object to such use on the ground that no plan has been furnished him.

Although the power to take land by the right of eminent domain which has been granted by the Legislature to a domestic railroad corporation will not pass to a foreign corporation, which by deed succeeds to the rights and powers of the domestic corporation, without the assent of the Legislature, such assent may be gathered by implication from a series of acts of the Legislature.

HOLMES, J. The first two cases are actions of tort in two counts, one in trespass, the other alleging the obstruction of a right of way. The alleged trespass consists of the use of a strip of land, five rods wide, by the defendant for its road across the farm of each of the plaintiffs, and is admitted, unless the defendant has a valid location under the statutes of this State. The other count is of less importance, and will be referred to later.

The defendant is the successor of the Boston, Hartford, and Erie Railroad Company, St. 1873, *c.* 289, and the location

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principally relied on is a location five rods wide made by that company on March 30, 1866. At that time that company was a Connecticut corporation only, and held no charter from this Commonwealth. It had taken a deed from the Southern Midland Railroad Company, (whose projected road ran through the premises in question,) purporting to convey the franchises and property of the latter, and certain acts had been passed by the Legislature; but the plaintiff contends that nothing had been done sufficient to confer upon a foreign corporation the power to take land by eminent domain, and that, if enough had been done, the Boston, Hartford, and Erie Railroad Company did not comply with conditions precedent attached to the exercise of such power.

The last objection may as well be disposed of at the outset. It appeared that plans of the land taken were prepared and furnished by the company to all land-owners who demanded them, and to no others. It did not appear that they were furnished to the owners of the plaintiffs' farms. It is argued for the plaintiffs that the burden was on the defendant to show that it had delivered plans to all owners of land taken, or at least to the owners of the plaintiffs' farms, whether demanded or not, and however long after the event, to save its use of their lands from being deemed a trespass. But if the requirement of the Gen. Sts. c. 63, § 45, to "furnish" a plan, means more than deliver on demand, as to which we express no opinion, the plan, by the words of the section, is not to be furnished until after the corporation has taken the land, and the title of the corporation is not affected by failure to furnish it, but only the right to enter upon and use the land, which is suspended, except for making surveys, until the plan has been delivered. After the road is built, the plan is no longer necessary or useful. *Charlestown Branch Railroad* v. *County Commissioners*, 7 Met. 78, 83. And whatever might have been the merits of the plaintiffs' case had they or their predecessors objected to the use of the land when the railroad was first laid out, and when the right to object could and would have been at once removed, it is too late for them to take the objection now, when the road has been constructed and in operation for nearly twenty years. See *Dietrich* v. *Murdock*, 42 Mo. 279.

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The question of the power of the Boston, Hartford, and Erie Railroad Company to make the location of 1866 is more difficult. The Southern Midland Railroad Company, which sold to the Boston, Hartford, and Erie Railroad Company, was the Midland Land Damage Company, with a changed name. St. 1863, *c.* 116. The Midland Land Damage Company was incorporated by the St. of 1861, *c.* 155, and was made up of parties having claims for land damages against the Midland Railroad Company. It was given general railroad powers for the purpose of completing its road, § 3, and was authorized to purchase the franchise and property of the Midland Railroad, § 7; and although it would seem not to have completed the purchase when the St. of 1862, *c.* 126, was passed, "to extend the time for locating and constructing the Midland Railroad," it appears to have done so before the St. of 1863, *c.* 116. (In the third case, the deed was put in, dated June 14, 1862.) The Midland Railroad Company was incorporated by the St. of 1858, *c.* 60, with general powers, including that of taking land by eminent domain, and also with special power to buy out the Boston and New York Central Railroad Company. By § 2, for the purpose of completing the said railroad, it was to have all the rights to which the last-named company was then entitled. It made the purchase on November 1, 1858. The Boston and New York Central Railroad Company was successor, by consolidation, to the powers of the Southbridge and Blackstone Railroad Company, which was incorporated by the St. of 1849, *c.* 194. (Sts. 1852, *c.* 158; 1854, *c.* 447. *Boston & Providence Railroad* v. *Midland Railroad*, 1 Gray, 340.) As such successor, it had made a location three rods wide over the locus on August 5, 1854. And as this was assumed by the counsel for the plaintiffs to have been valid, subject to the objection just disposed of, we shall make the same assumption.

To repeat. The Boston, Hartford, and Erie Railroad Company's grantor, under a changed name, was the purchaser of the franchise and rights of the Midland Railroad Company. The Midland Railroad Company was given general powers, and succeeded to all the powers of the Boston and New York Central Railroad Company, including the powers of the Southbridge and Blackstone Railroad Company. Assuming the three-rod wide

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location of the Boston and New York Central Railroad Company to have been valid, we do not understand the counsel for the plaintiffs to deny that the grantor of the Boston, Hartford, and Erie Railroad Company could have made the five-rod location in 1866, if it had not conveyed away its franchise and property, and if the legislation then in force had applied to it. St. 1865, *c.* 171. Gen. Sts. *c.* 63, § 38. *Boston & Providence Railroad* v. *Midland Railroad*, *ubi supra*. We do not understand that the location of 1866 was without the limits prescribed by the St. of 1849, *c.* 194, § 2.

Before examining the powers of the Boston, Hartford, and Erie Railroad Company more specifically, it will be well to advert to one or two general considerations. It was conceded by the plaintiffs' counsel that the power to take land by eminent domain may be given to a foreign corporation. When the use for which land is taken is otherwise a public use, such as a railroad within the State granting the power, the use is not the less public because the owners are domiciled or incorporated out of the State. In *In re Townsend*, 39 N. Y. 171, it was held that the power could be given to a company in another State in aid of a canal which also was in another State. And the proposition which we have laid down has never been doubted, so far as we know, by any court of last resort. *New York & Erie Railroad* v. *Young*, 33 Penn. St. 175. *State* v. *Sherman*, 22 Ohio St. 411, 434. *Southwestern Railroad* v. *Southern & Atlantic Telegraph Co.* 46 Ga. 43, 51. *Gilmer* v. *Lime Point*, 18 Cal. 229, 251, 255. See *Clark* v. *Barnard*, 108 U. S. 436, 452.

The decision of this court in *Burt* v. *Merchants' Ins. Co.* 106 Mass. 356, that the power could be conferred upon the United States government, is criticised in *Kohl* v. *United States*, 91 U. S. 367, 373; see also *Darlington* v. *United States*, 82 Penn. St. 382; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 154; but the criticism is not applicable to a case like the present.

It seems to us equally clear that a corporation by consent of the Legislature may take this power as quasi successor of another corporation to which it was originally granted, and it is not very material whether the legislative consent be regarded as authorizing a transfer of the old power, or, more strictly, as delegating a new power in the same terms as the old. See *State* v.

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Sherman, 22 Ohio St. 428. The substance of the transaction is seen in cases of consolidation. *Boston & Providence Railroad* v. *Midland Railroad*, *ubi supra*. But there is nothing in reason to confine it to such cases. See *Atkinson* v. *Marietta & Cincinnati Railroad*, 15 Ohio St. 21; *Coe* v. *Columbus, Piqua, & Indiana Railroad*, 10 Ohio St. 372, 387. *Hall* v. *Sullivan Railroad*, 21 Law Rep. 138, 141.

When the power is claimed under the form of a transfer rather than of original grant, the legislative consent or grant may be inferred somewhat more readily than where the whole question is new, because the Legislature has already adjudicated the use to be public, and has granted a coextensive power. See *Black* v. *Delaware & Raritan Canal*, 7 C. E. Green, 130, 402. For, while it is very plain that the power in this Commonwealth could not be transferred to, or exercised by, a purchaser from the original donee, without such consent or grant, (*Braslin* v. *Somerville Horse Railroad*, 145 Mass. 64, 67, *Commonwealth* v. *Smith*, 10 Allen, 448,) the reasons which have led some courts and judges to doubt the need of such consent for the transfer of franchises show that the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred. *Shepley* v. *Atlantic & St. Lawrence Railroad*, 55 Maine, 395, 407. *Kennebec & Portland Railroad* v. *Portland & Kennebec Railroad*, 59 Maine, 9, 23. *Miller* v. *Rutland & Washington Railroad*, 36 Vt. 452, 492. *Bickford* v. *Grand Junction Railway*, 1 Sup. Ct. of Canada, 696, 738. And this reasoning is of equal force whether the power to take land by eminent domain is properly called a franchise or not. *Coe* v. *Columbus, Piqua, & Indiana Railroad*, *ubi supra*. *Chicago & Western Indiana Railroad* v. *Dunbar*, 95 Ill. 571. *Pierce* v. *Emery*, 32 N. H. 484, 507, 511, 513.

Finally, the legislative consent may be expressed by way of ratification of what purports to be a transfer already executed. *Shaw* v. *Norfolk County Railroad*, 5 Gray, 162, 180; *S. C.* 16 Gray, 407, 410. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459. And it may be gathered by implication from a series of acts. *East Boston Freight Railroad* v. *Eastern Railroad*, 13 Allen, 422.

At the time of the attempted transfer by the Southern Midland Railroad Company to the Boston, Hartford, and Erie Railroad

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Company, the former had power, by the St. of 1861, *c.* 155, § 7, to purchase and enjoy "all the rights and privileges" of the Midland Railroad Company, and to "use, enjoy, lease, sell, or convey the same to any other railroad company." And, inasmuch as from an early date it had been contemplated that the road would not only connect with roads outside the State, but that the corporations within and without the State might unite, (Sts. 1850, *c.* 268, § 9; 1852, *c.* 158; *Boston & Providence Railroad* v. *Midland Railroad*, 1 Gray, 358;) it was not very extraordinary if the parties concerned assumed that the power to sell was not confined to domestic purchasers, especially as in the next line a purchase of cars jointly with connecting roads was allowed, showing that other corporations beside those of this State were in the mind of the Legislature. It was hardly less natural that it should be assumed that the Legislature intended the purchaser to stand in the seller's shoes, and to have whatever powers the seller would have had if the sale had not been made.

The two acts next to be cited, both passed before the location by the Boston, Hartford, and Erie Railroad Company, either show that this construction of the St. of 1861 is the true one, (*Kohl* v. *United States*, 91 U. S. 374,) or else sufficiently express the consent of the Legislature. By the St. of 1865, *c.* 171, "The time for locating and constructing the road of the Boston, Hartford, and Erie Railroad Company, is hereby extended to" May 1, 1868. The St. of 1865, *c.* 275, authorizes the same road to secure any bonds issued under its Connecticut charter "by mortgage of its railways, property, rights, and franchise, or any part thereof, purchased or acquired by contract or arrangement with the Southern Midland Railroad Company, ... situate and being in this Commonwealth, ... provided, that nothing in this act contained shall in any way affect any claim, or any remedies, ... which any person may have against said corporation or any other railroad corporation, ... for damage caused to such person by the taking of the land or any part thereof included within the location of said corporations, or any or either of them, or by the laying out, making, and maintaining a railroad over the same." See also St. 1864, *c.* 310.

After reading these acts, we cannot doubt that the Legislature believed that the purchase by the Boston, Hartford, and Erie

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Railroad Company was valid, and intended that it should be, and that the purchaser should have the rights and powers which the seller had previously possessed. The latter statute in terms saves claims against the purchaser for damage caused by the taking of land. The former gives it three years to locate and construct its road. The word "locate" is a term of art, in using which the Legislature can have had but one meaning. As was said by Chief Justice Shaw about this very road, "The effect of the location is to bind the land described to that servitude." *Boston & Providence Railroad* v. *Midland Railroad*, 1 Gray, 360. See also Gen. Sts. *c.* 63, §§ 17, 18. *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574. *Charlestown Branch Railroad* v. *County Commissioners*, 7 Met. 78. Moreover, the Legislature intended that the power to locate should be exercised by the Boston, Hartford, and Erie Railroad Company, as quasi successor to its vendor; for the power is given in the form of an extension of the time previously allowed, referring, of course, to the statute giving the vendor until May 1, 1863, for the same purpose. St. 1863, *c.* 116, § 2. See, further, St. 1862, *c.* 126, "An act to extend the time for locating and constructing the Midland Railroad;" and Sts. 1861, *c.* 44; 1860, *c.* 44; 1859, *c.* 23; 1858, *c.* 13; 1857, *c.* 32; 1856, *c.* 33; 1855, *c.* 115; 1854, *c.* 447; 1851, *c.* 134; 1849, *c.* 194, § 2.

If there had been no consolidation, and the transfer had been direct from the Southbridge and Blackstone Railroad Company to another Massachusetts corporation, we hardly can suppose that it would have been argued that the purchaser had not the same powers to take land and to complete the road that the Southbridge and Blackstone Railroad Company would have had, if its time had been extended by similar words before the sale. No doubt, the expression of the Legislature's belief and intent might have been plainer. But the St. of 1865 was passed before *Commonwealth* v. *Smith*, *ubi supra*, was decided, and when the need of such expression was less accurately understood. If, however, the intent can be discovered, that is enough. And if the intent would be clear in the case which we have supposed, it is clear notwithstanding the facts that the grantor was formed by consolidation of different lines, and that the grantee was a Connecticut corporation. So far as the former fact is concerned,

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the St. of 1863, *c.* 116, § 2, had already fixed a common time, by extension, for finishing all parts of the line; and, as to the latter, the statutes, by treating the Connecticut corporation as a successor to its vendor, impliedly but plainly subjected it to the conditions to which its vendor was subject with respect to the power of taking lands.

We repeat, that it is immaterial whether the purchaser in strict theory receives this power by transfer or by a new grant. For if the grant to the purchaser is of a power limited and qualified, as if it had been the same power conferred on the vendor and taken by succession, the rights of landowners are as fully protected as they were against the vendor, except so far as the fact that the purchaser is a foreign corporation necessarily makes a difference. In this case that fact made no difference. The landowners could have required security of the Boston, Hartford, and Erie Railroad Company, as well as of the Southern Midland Railroad Company, and they had the same means of compelling both security and payment in the one case as in the other, by stopping the use of their land. Gen. Sts. *c.* 63, §§ 32–34, 39. See *Drury* v. *Midland Railroad*, 127 Mass. 571, 576.

We pass now to the acts of the Legislature subsequent to the location in question.

The St. of 1866, *c.* 142, approved April 12, ratifies the mortgage made under the St. of 1865, *c.* 275, and provides for the exchange of bonds secured by former mortgages, and for the recording of the mortgage.

The St. of 1866, *c.* 266, approved May 26, about two months after the location, authorizes the Boston, Hartford, and Erie Railroad Company to locate, construct, and maintain a road of about six hundred feet to the Rhode Island line. There are no express provisions for compensation. It is assumed, of course, that the power is subject to the General Statutes.

The St. of 1866, *c.* 278, § 5, authorizes the company to construct a railroad from its "chartered line" in Newton to its "chartered line" in Somerville.

The St. of 1867, *c.* 75, incorporating the Roxbury Branch Railroad Company, authorizes the corporation to transfer its franchise, property, and all its rights to the Boston, Hartford, and Erie Railroad Company; and other statutes give like powers to

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other corporations. St. 1867, *c.* 133, § 5; *c.* 170, § 14. St. 1868, *c.* 35, § 8. St. 1869, *c.* 406.

The St. of 1867, *c.* 284, authorizes a loan from the State to the company of $3,000,000, for the purpose of aiding it to complete its railway from Boston to Fishkill, New York, with elaborate conditions.

By the St. of 1868, *c.* 145, the company "heretofore created in the State of Connecticut, ... and acting within this Commonwealth and recognized by acts heretofore passed by its Legislature, is hereby declared to be a corporation by that name, and vested with all the franchises, powers," etc., set forth in the general laws, "and the acts of said company in forming a union or connection with one or more railroad companies in the States of Rhode Island, Connecticut, and New York," to connect Boston with the Erie Railway Company in New York by a continuous line, are ratified. This seems to be intended to make the corporation a Massachusetts corporation (St. 1874, *c.* 334), and to ratify unions with other roads. The act then continues, "and the said Boston, Hartford, and Erie Railroad Company is hereby substituted in the place and vested with all the franchises, rights, property, and powers, and is subject to all the duties and liabilities, of the Southern Midland Railroad Company," &c. This part of the statute sanctions, in terms, such a substitution as we have construed the earlier acts to sanction by fair implication, and shows very plainly what was in everybody's mind from the beginning. If our construction is right, the act is simply declaratory and passed *ex majori cautela.*

The St. of 1869, *c.* 450, increases the amount of State aid to the road to $5,000,000. The St. of 1869, *c.* 456, authorizes bonds and a mortgage of lands and flats. The St. of 1871, *c.* 372, authorizes the foreclosure of a mortgage to the Commonwealth.

The St. of 1873, *c.* 289, ratifies the proceedings of the bondholders of the Boston, Hartford, and Erie Railroad Company in organizing the defendant, and authorizes the new corporation to acquire all the rights, powers, and franchises of the former company, and to make a new mortgage of "its railroads, property, and franchises." We may remark here, — with reference to a suggestion, thrown out in the last two cases, that the defendant did not succeed to all the rights of the Boston, Hartford, and Erie

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Railroad Company because its title was derived in part from foreclosure of a mortgage which was dated a few days before the location, — that, if the suggestion could help either the plaintiffs in the first two cases or the defendants in the last two, and if it is not answered by this statute, it is by the fact that the mortgage covered subsequent locations, (see 107 Mass. 3, note,) and was ratified in that form, as we have seen, by the St. of 1866, *c.* 142.

Finally, the St. of 1873, *c.* 289, ratifies the proceedings of the bondholders of the Boston, Hartford, and Erie Railroad Company in organizing the defendant, and authorizes the new corporation to acquire all the rights, powers, and franchises of the former company, and to make a new mortgage of "its railroads, property, and franchises." The St. of 1874, *c.* 334, dissolves the Boston, Hartford, and Erie Railroad Company, saving all rights.

It thus appears that for twenty years the Commonwealth has constantly dealt with this corporation and its predecessor as having a good title to the road, and as having possessed the powers which they assumed to exercise. The Commonwealth has advanced a large sum of money on that assumption. For nearly twenty years before these actions were brought the plaintiffs have acquiesced in the same view, while the road over their lands has been in public operation. Meantime the mortgage was made, and the bonds were sold in the market. We think that courts should be slow to pronounce the Legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will, when for so long a time everything has been conducted upon that footing. But we are satisfied, for the reasons which we have given, that the opinion of the Legislature was correct, and that the Boston, Hartford, and Erie Railroad Company must be taken to have had the power and right to make its location of July 30, 1866.

It was admitted that, if the five-rod wide location of 1866 was valid, the claims of the plaintiffs to rights of way must be abandoned. The alleged adverse use had not continued for twenty years across the five rods. It would be too refined to say, and it was not argued, that the adverse use, if any, of a way across the three-rod location of 1854, begun before the widening, ripened

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into a right of way across the original three rods after the widening, and carried with it a necessary right of access across the strips on either side which made the residue of the five rods. For, without admitting that there would have been any such right of access across the outside strips had a right of way existed across the three rods before the widening, it is enough to say that, as no rights had been acquired at that time, the new location gave the railroad company the right to the exclusive use of the land taken, and thus interrupted, for a moment at least, any adverse user, and made a fresh start necessary as to the whole. *Old Colony Railroad* v. *Miller*, 125 Mass. 1, 5. *Smith* v. *New York & New England Railroad*, 142 Mass. 21, 22.

It follows that the rulings of the court below, that the locations were valid, and that the plaintiffs' evidence failed to show an adverse use of the crossings for a period of twenty years before the obstruction of them by the defendant in 1885, were correct, and that, by the terms of the report, judgment must be entered on the verdicts. *Judgment on the verdicts.*

The last two cases are actions for breach of covenant of warranty, the eviction complained of being by the same location of 1866. The only question seriously argued is whether that location was valid, as the court ruled. *Verdicts to stand.*

A. J. Bartholomew & D. Manning, Jr., for the plaintiffs in the first two cases.

F. P. Goulding, (*R. M. Saltonstall* with him,) for the New York & New England Railroad Company.

J. M. Cochran, for the plaintiffs in the last two cases.

R. Hoar, for the defendant in the third case.

A. J. Bartholomew, for the defendant in the fourth case.

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MICHAEL O'DONNELL *vs.* INHABITANTS OF CLINTON.

Worcester. Oct. 6, 1887. — Jan. 4, 1888. C. ALLEN & KNOWLTON, JJ., absent.

On a petition, under the Pub. Sts. *c.* 49, §§ 79, 105, for the assessment of damages caused by taking land for a town way, and damages to the petitioner's house caused by the taking, there was evidence that the petitioner could not read, and that the road commissioners of the town knew of his inability; that before filing his petition he had accepted an award of $200 for damages, and had put his mark to a receipt acknowledging full payment of all claims, but which he understood at the time, and declared, to be for the land alone; that the road commissioners expressed no dissent, but said that "that would be all right;" that the petitioner, on learning what he had signed, repudiated the transaction, tendered the money back to them, giving them a notice addressed to the town, and left the money and the notice in the hands of the town treasurer. *Held*, that the receipt was not a bar.

If a town authorizes its road commissioners to pay a certain sum in full for all damages sustained by an owner of land caused by the taking of his land for a town way, and the commissioners pay the money and take a receipt under such circumstances that their act amounts to constructive fraud, the town cannot, on a petition for the assessment of damages for the taking, set up the receipt as a bar to the petition.

HOLMES, J. This is a petition for the assessment of damages caused by taking land for a town way, including damage to the petitioner's house. Pub. Sts. *c.* 49, §§ 79, 105. The petitioner before filing his petition had accepted two hundred dollars awarded by the road commissioners, and had set his mark to a receipt prepared by them acknowledging full payment of all claims. The respondent asked a ruling that this settlement was a bar, which was refused, and the respondent excepted.

The petitioner's evidence tended to show that he could not read, and that the road commissioners knew of his inability; that at the time of accepting the two hundred dollars he stated that he took it for the land alone, and also stated that he signed the receipt for the land alone, understanding that to be its tenor; that the road commissioners expressed no dissent, but through their spokesman, McGowan, said that "that would be all right;" and that as soon as the petitioner understood that the commissioners regarded the payment as a full settlement he repudiated the transaction, tendered the money back to them, giving them

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a notice addressed to the town, and left the money with the notice in the hands of the town treasurer, although no sufficient tender was made to the latter.

The court instructed the jury, that it was not necessary that there should have been any intent to defraud the petitioner, but that it was necessary to show some conduct which was calculated to mislead him and did mislead him. In the connection in which the instruction was given, it must be taken to mean that the petitioner must have been misled as to the terms of the receipt, and as to what the money was paid for. Thus construed, and having reference to the petitioner's evidence, it was sufficiently favorable for the respondent, and the respondent's request for a ruling was rightly refused.

If the petitioner was ignorant of the contents of the instrument prepared by the respondent, and was known to be so by the respondent's agents, and if he expressly declared in good faith that he set his mark to it as a receipt for the damage to his land alone, and the respondent's agents thereupon accepted the instrument in silence, or with words importing an assent to that declaration, such conduct would be a representation that the instrument was what it was signed for. *Trambly* v. *Ricard*, 130 Mass. 259, 261. *Hall* v. *Holden*, 116 Mass. 172, 176. And a representation of what is known to be false may be none the less a fraud that it is made without any corrupt motive or intent. *Stone* v. *Denny*, 4 Met. 151, 161. *Fisher* v. *Mellen*, 103 Mass. 503. *Litchfield* v. *Hutchinson*, 117 Mass. 195. *Polhill* v. *Walter*, 3 B. & Ad. 114. *Quick* v. *Milligan*, 108 Ind. 419, 422.

It is unnecessary to go further, and to consider whether or not the ultimate reason why the party cannot be held in the case supposed is that the overt acts of setting his mark to the instrument and delivering it, which, standing alone, would have been an execution of it, were qualified by another overt act which changed their character, as between the parties, and prevented the mark and delivery from having that effect, or from expressing an intent corresponding with the written words. In the old books it is said that a deed which is misread to an illiterate man, although by his friend and without fraud, does not bind him. *Thoroughgood's case*, 2 Rep. 9. Com. Dig. *Fait*, B. 2. *Foster* v. *Mackinnon*, L. R. 4 C. P. 704, 711. *Schuylkill* v. *Copley*, 67

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Penn. St. 386, 389. And the proper mode of pleading the facts was *non est factum*, because, as was said, "the matter proves that it never was his deed." Plowden, 66. Y. B. 30 Ed. III. 31, 32. Lib. Ass. 292, pl. 30; *S. C.* 44 Ed. III. 23, pl. 28. 9 Hen. V. 15, pl. 2. 9 Hen. VI. 59, pl. 8. 2 Roll. Abr. 28. 1 Gilb. Ev. (6th ed.) 144. Keilwey, 70 b, pl. 6. *Pigot's case*, 11 Rep. 26 b, 27 b. *Mullen* v. *Old Colony Railroad*, 127 Mass. 86, 90. *White* v. *Graves*, 107 Mass. 325, 328. *Somes* v. *Brewer*, 2 Pick. 184, 204. Whereas an ordinary case of fraud or duress could not be pleaded in this way, because the delivery was not void. Plowden, *ubi supra*. 1 Chit. Pl. (7th ed.) 511. See *Fairbanks* v. *Snow*, *ante*, 153. But we put our decision solely on the ground of fraud, and express no opinion with regard to the suggestions last thrown out.

In either view, the oral evidence is not offered for the purpose of varying the written instrument, or of adding an oral promise to it, which it may be assumed could not be done; *Brown* v. *Cambridge*, 3 Allen, 474; *James* v. *Bligh*, 11 Allen, 4; but for the purpose of showing that it was never executed, or was voidable for fraud. We may add, by way of caution, that in the case of a *bona fide* purchaser for value other considerations come in, which have no place here. See *White* v. *Duggan*, 140 Mass. 18, 20; *Williams* v. *Stoll*, 79 Ind. 80; *Chapman* v. *Rose*, 56 N. Y. 137.

Leaving the receipt on one side, if the conduct of the respondent's agents was calculated to lead the petitioner to suppose that the money was paid for the land alone, and did lead him to suppose so, then it was paid for the land alone. To lead a person reasonably to suppose that you assent to an oral arrangement is to assent to it, wholly irrespective of fraud. Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words. See *Hall* v. *Holden*, *ubi supra*. *Ford* v. *Ford*, 143 Mass. 577, 578.

It was argued that the road commissioners had not power to make the arrangement testified to by the petitioner, and it is true that the two hundred dollars was decreed, and the decree was accepted by the town, as an award for all the damages suffered. But assuming that the commissioners had no right to offer the sum for less than all the damages, that did not make it

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impossible for them to do so in fact, and would not make a payment which purported to be made and accepted for land alone a payment for land and buildings. Of course, too, if the conduct of the commissioners, however innocent in intention, amounted to fraud by construction of law, the respondent, when it claims the benefit of an arrangement made through them, takes it with all its defects.

Upon the facts, as the petitioner states them, he had a right to repudiate the transaction when he found what he had signed. *Mullen* v. *Old Colony Railroad*, *ubi supra*. *Smith* v. *Holyoke*, 112 Mass. 517. *Michigan Central Railroad* v. *Dunham*, 30 Mich. 128. If it was necessary for him to return the money, he did all that he was called on to do. Had the commissioners accepted his tender, things would have been restored to their condition before the settlement. The money was left where the town could take it at any time, and the town was notified; but it is plain that the town did not accept his version of the facts, and denied his right to repudiate the arrangement.

Exceptions overruled.

J. W. Corcoran & H. Parker, (*W. R. Dame* with them,) for the respondent.

A. Norcross & H. C. Hartwell, (*C. F. Baker* with them,) for the petitioner.

JOHN MURPHY & another *vs.* PATRICK H. MCNULTY.

Bristol. Oct. 26, 1887. — Jan. 4, 1888. C. ALLEN & KNOWLTON, JJ., absent.

If a dealer in intoxicating liquors, having a license authorizing him to sell such liquors only at his shop, sends a wagon containing liquors to his regular customers, and authorizes the driver to let such customers have what they want from time to time, a delivery of liquor at the shop of a customer by the driver, in pursuance of an order then and there given, is an illegal sale; and the dealer cannot maintain an action to recover the price of the liquors delivered, although he had previously, at his own shop, made an agreement with the customer to supply him in this manner with such liquors as he should from time to time require.

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CONTRACT, on an account annexed, for goods sold and delivered. Trial in the Superior Court, without a jury, before *Barker*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiffs introduced testimony tending to show that the defendant, who was a liquor dealer and who conducted his business under a license of the first class, called upon John Murphy, one of the plaintiffs, at their place of business, and where they were licensed to sell liquors under a license of the fourth class, issued by the city of Fall River, and made a contract with said Murphy to furnish and supply him with ales and liquors; and that the plaintiffs directed their teamsters to call upon the defendant on their rounds to customers, and supply him with such liquors as he might order.

The defendant had a pass-book, given to him by the plaintiffs, on the cover of which appeared, "Patrick McNulty in account with John Murphy & Co., wholesale liquor dealers, 141 South Main Street, Fall River, Mass." The pass-book was in the possession of the defendant, and the entries were made by the plaintiffs' teamsters. There was evidence tending to show that the teamsters, who acted as agents of the plaintiffs, did load four or five barrels of ale on their wagons daily, except Sundays, and drove around to their regular customers, and, if one of them was out of ale, they would deliver what was needed by the customer, and at other times they would take an order from said customer at his shop, and go to the plaintiffs' shop and return with the order filled, and deliver the liquors at the customer's shop.

There was no evidence of teamsters delivering liquors to anybody except regular customers, or of their receiving orders from other than regular customers.

It also appeared that the defendant ordered liquors a few times at the shop of the plaintiffs. Four witnesses for the plaintiffs testified that all of the liquors except ales were ordered by the defendant of the plaintiffs at the shop of the defendant, the order being given to the drivers, taken to the shop of the plaintiffs and filled, and then taken back to the shop of the defendant and delivered; but the defendant testified that he ordered and received such liquors from the teamsters while the teamsters were at his shop.

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The plaintiffs asked the judge to rule, that if the plaintiffs, at the beginning of their dealing with the defendant, agreed to furnish the defendant with ales and liquors as a regular customer, and, in pursuance of this agreement, sent his agents to the defendant's shop for orders, which were communicated to the plaintiffs at the plaintiffs' shop, and the goods then delivered by the plaintiffs' teams, and, in further pursuance of said agreement, orders were given to the plaintiffs by the defendant, at the plaintiffs' shop, and there filled, and, in further pursuance of said agreement, at times, the plaintiffs' teamsters brought, upon their regular rounds, ales and liquors of the plaintiffs' in the plaintiffs' teams to the defendant's shop, which ales and liquors had not been previously ordered by the defendant, and then, at the defendant's shop, filled from such ales and liquors orders then and there given to the plaintiffs' teamsters, such sales would be legal, and the plaintiffs could recover therefor.

The judge refused so to rule, but ruled that sales so made by teamsters from the plaintiffs' wagon of ales and liquors not previously ordered by the defendant would be illegal; and found for the defendant.

The plaintiffs alleged exceptions.

D. V. Sullivan, for the plaintiffs.

M. G. B. Swift, for the defendant.

DEVENS, J. The plaintiffs had what is termed a license of the fourth class, which authorized them to sell spirituous liquors not to be drunk upon their premises. They could conduct this business lawfully only upon the premises designated in and covered by their license. Pub. Sts. *c.* 100, § 9, *cl.* 1, and § 10. Upon sales there made they could recover, such sales being legal. Upon sales made elsewhere they could not recover, as such sales would not be authorized by their license.

The request for a ruling made by the plaintiffs embraced, in a single paragraph, three different assumptions of fact. The request as made was refused, and the instruction actually given dealt only with the third assumption. It was evidently upon the state of facts thus assumed that the plaintiffs sought to recover. The plaintiffs in their argument at the bar also have relied solely upon the failure to give the instruction based upon the third assumption, and that actually given in lieu thereof.

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The request was made as a whole, and was refused as such, and the plaintiffs could not be allowed to maintain an exception to such refusal based upon the ground that a portion of his request, if it had been separately made, should have been granted. It is by no means impossible that such instructions may actually have been separately given. The defendant was himself a liquor dealer, conducting his business under a license of the first class, and the ruling asked, upon the third assumption of facts, was in substance, that, "if the plaintiffs, at the beginning of their dealing with the defendant, agreed to furnish the defendant with ales and liquors as a regular customer," and, in pursuance of said agreement, "at times, the plaintiffs' teamsters brought, upon their regular rounds, ales and liquors of the plaintiffs' in the plaintiffs' teams to the defendant's shop, which ales and liquors had not been previously ordered by the defendant, and then, at the defendant's shop, filled from such ales and liquors orders then and there given to the plaintiffs' teamsters, such sales would be legal, and the plaintiffs could recover therefor." The court refused so to rule, and ruled that "sales so made by teamsters from the plaintiffs' wagon of ales and liquors not previously ordered by the defendant would be illegal."

A general agreement by the plaintiffs that they would furnish the defendant with such ales and liquors as he might desire to use in his business could not identify any of these articles as the subject of a contract mutually assented to by the parties. It would not authorize the plaintiffs to set apart any such goods at their place of business as the defendant's property, or to cause any to be transported to the defendant's shop, as if the same had been ordered or purchased by him; nor did the plaintiffs attempt anything of the sort.

The case at bar does not require us to consider whether, if orders had actually been given at, or sent to, the shop of the plaintiffs, and the liquors sent in response thereto, (this being in accordance with the usual conduct of such business,) such a transaction could be considered a sale at the plaintiffs' place of business under the statute, even if the plaintiffs did not authorize any delivery of the goods sent unless paid for upon such delivery, or even if the defendant had the right to reject the goods if not satisfactory when they arrived. The plaintiff sent

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out the liquors that their customers might be supplied from the wagon, if they so desired. This was simply making it convenient for them to purchase on their own premises, if the customers saw fit so to purchase. Such a transaction with the teamster constituted a peddling of the articles sold, and was carrying on the licensed business of the plaintiffs, not at their own shop and on their own premises, but on those of the defendant.

The fact that the teamster was to fill the orders only of regular customers, that is, of those who habitually bought of the plaintiffs, and not of chance or occasional customers, did not render the transaction the less a sale on the premises of the customer. *Exceptions overruled.*

JAMES COUNSELL *vs.* SYLVANUS M. HALL.

Bristol. Oct. 27, 1887. — Jan. 4, 1888. C. ALLEN & KNOWLTON, JJ., absent.

Machinery upon which a servant was employed became defective and dangerous. The master promised the servant that the defect should be remedied. The servant continued to attend to the machinery, knowing that the defect had not been remedied, and sustained an injury by reason of the defect. *Held*, in an action by him against the master for the injury, that the plaintiff was not entitled to a ruling that, on these facts, the defendant was liable.

TORT, for personal injuries sustained by the plaintiff while in the employ of the defendant.

Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions in substance as follows:

The evidence of the plaintiff tended to show, that he entered into the employ of the defendant in March, 1885, taking charge of a small steam-engine of about six horse-power, as engineer, and continued in such employ until July 13, 1886, the time of his injury; that during his employment up to June 28, 1886, the engine, boiler, and appliances, including the glass water-gauge, were in good and suitable condition; that the glass water-

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gauge occasionally broke and was replaced by the plaintiff, who received from the defendant proper ones adapted to the purpose; that the proper length of the gauge was about fourteen inches, it being cylindrical in form, hollow, and of an inside diameter of about a quarter of an inch; that, on June 28, 1886, the glass water-gauge which had been used since the preceding September gave out, and it was necessary to replace it with a new one; that the defendant, being informed of it, bought a water-gauge that was not fitted or adapted for the purpose, being too long and otherwise defective; that the defendant thereupon ground it down, and told the plaintiff to put it in place in connection with the boiler; that the plaintiff tried it as directed, and told the defendant that it was too long, and not adapted to the purpose; that thereupon he handed it back to the defendant, who took it and ground it down still more, leaving the end jagged and cracked about an eighth of an inch from the end; that the defendant then directed the plaintiff to put it in place in connection with the boiler; that the plaintiff objected to putting it in, and told the defendant that it was not suitable, and that it was shameful to put such a glass in; that the defendant replied, "Put it in now, and use it, and I will get another one;" that the plaintiff then put it in, but it jammed, and did not properly fit in place, as did those that had been before used, which were fitted and adapted to the purpose by the manufacturer; that the gauge so cracked and fitted was dangerous to be used; and that, on June 29, the plaintiff requested the defendant to get a proper one, and the defendant said he would when he got time to go into the city, though he did not procure one.

The plaintiff continued in the defendant's employ, running the boiler until July 13, when, while he was attending to his duty about the boiler and the engine, using due care, the glass water-gauge exploded, and a piece of the glass flew into his eye, causing the injury complained of.

The defendant introduced evidence tending to contradict all the contentions of the plaintiff referred to in his request for a ruling hereinafter stated, and there was much other evidence touching the question of negligence, and the other questions of the case. There was also testimony tending to show, that, when

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the plaintiff entered the service of the defendant, he undertook to assume the responsibility of the management of the engine and boiler, the defendant not being skilled in that business.

The plaintiff requested the judge to instruct the jury as follows: "If a servant enters into an employment when the machinery is in a state of safety, and continues in the service, and while in the service an appliance of the machinery becomes out of repair, and it is necessary to withdraw it and replace it by another, and the employer for a temporary purpose replaces it by an appliance that is not suitable for the purpose, the use of which exposes the servant to greater risk and danger of injury, and the servant complains of it, and tells his employer that it is unsuitable, and the employer promises to replace it by a suitable one, but fails to do so, he is guilty of negligence; and, if an injury to the servant ensues in consequence thereof, he is responsible to the servant in damages therefor."

The judge refused to give the instruction requested, but instructed the jury generally, in terms not excepted to, in relation to the rights, duties, and liabilities of master and servant, and to the law of negligence, and as to what constitutes negligence, but did not state that any particular matters testified to would or would not constitute negligence.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. Brown, for the plaintiff.

W. Clifford, for the defendant.

HOLMES, J. If machinery upon which a servant is employed has become dangerous, and the servant has complained of it, and has been promised that it shall be repaired, but is injured before the defect is remedied, and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury in determining whether he has assumed the risk in the mean time, and whether he was using due care in working when he knew there was danger. But no case, we believe, has gone the length of deciding that the promise entitles the servant to recover as matter of law, which was the effect of the ruling asked. And if, as supposed in the request, the time for performance has gone by before the accident,

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and, as must have been the fact, the servant knows that the repair has not been made, there is a very strong argument that the servant is no longer relying upon the promise, but has decided to take the risk. *Exceptions overruled.*

DANIEL F. McCARTHY & another *vs.* ALBERT D. SWAN.

Essex. Nov. 1, 2, 1887. — Jan. 4, 1888. DEVENS & KNOWLTON, JJ., absent.

A case pending in court was sent to an auditor. The parties and a third person appeared before the auditor and filed with him an agreement appointing him referee, and submitting to him all matters in dispute between the three, growing out of a certain matter referred to in the declaration. The agreement was headed with the name of the case and the court in which it was pending. The submission was stated to be "in the above entitled action," the referee was to report to the court, and final judgment was to be entered in the action upon the coming in of the referee's report. No rule of reference was issued by the court. *Held*, that the agreement was not one *in pais*, and did not work a discontinuance of the action. *Held, also*, that, as the defendant was not indebted to the plaintiff and to the third person jointly, no rule of reference could have been issued in the action; and that the referee's award could not be accepted.

CONTRACT. Writ dated May 21, 1883, and returnable to the Superior Court. The declaration contained four counts, and alleged, in substance, that one William Sullivan made a contract with the city of Somerville to build a sewer in said city; that Sullivan became indebted to the plaintiffs, and assigned to them his claim against the city for building the sewer; that Sullivan also became indebted to the defendant, and assigned the same claim to him, said assignment being made after the assignment to the plaintiffs; that the plaintiffs agreed that the defendant's claim and assignment should have preference over their assignment to the amount of $7000; that the defendant should receive from the city the whole amount due to Sullivan, and, after deducting $7000, should pay so much of the residue to the plaintiffs as should be sufficient to pay the plaintiffs' claim against Sullivan; and that the defendant had received from the

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city the amount of $23,000, but refused to pay the plaintiffs the amount due them.

At December term, 1883, a commission in ordinary form issued to W. F. Gile, Esq., as auditor. On February 13, 1885, the parties to the action appeared before the auditor, and they together with Sullivan executed an agreement of reference, which, after stating the name of the case and the court in which it was pending, proceeded as follows:

"In the above entitled action all matters in dispute between Daniel F. McCarthy, Mary McCarthy, and William Sullivan, and Albert D. Swan, arising out of the transactions and relations of the parties in the construction of the sewer in Somerville which is referred to in the declaration, are referred to the final determination of W. F. Gile, Esq., of Lawrence in said county, who shall hear the parties and report to said court what sum, if any, is due from said Swan to said parties, or either of them.

"And in case the referee shall find and report that anything is due from said Swan to said parties, or either of them, final judgment shall be entered for such sum in this action upon the coming in of the referee's report. And in case no sum is found to be due from said Swan to these parties, or either of them, final judgment shall be entered for the defendant in this suit; which judgment the parties agree shall have the same effect as though said Sullivan were a party plaintiff to this suit."

The defendant died on August 27, 1885, and on July 3, 1886, Alvin E. Mack, the executor of his will, appeared as a party defendant. On July 2, 1886, the parties appeared before said Gile, acting as referee under said agreement, and a hearing was begun. On the next day papers containing the suggestion of the defendant's death, the appearance of the executor, and the agreement of reference, were filed in the office of the clerk of the Superior Court; but no rule of reference was taken out.

On December 31, 1886, the referee filed his report, stating that there was due from the defendant to the plaintiffs the sum of $2374.23, with interest from April 10, 1880; and to William Sullivan the sum of $6000, with interest from April 10, 1880; "making a total sum of $11,751.84, inclusive of interest

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reckoned from the tenth day of April, 1880, to the date of this award, for which total sum final judgment is to be entered in this action, according to said agreement of reference."

The defendant filed twenty-four objections to the acceptance of the award, of which only the following need now be stated:

"Because there is now no case pending in which a judgment upon said award can be entered, and the parties to said award are not before the court. . . . .

"Because the said arbitrator was not appointed such by the court in which the suit of Daniel F. McCarthy and Mary McCarthy against Albert D. Swan was pending. . . . .

"Because by the alleged submission certain matters in dispute between Daniel F. McCarthy, Mary McCarthy, and one William Sullivan (the said Sullivan not then, at the time of the execution of said alleged submission, being, and never having since become, a party to said suit), were referred to arbitration.

"Because the alleged submission worked a discontinuance of said suit.

"Because the said W. F. Gile had no authority to make or to return to this court any award.

"Because this court has no jurisdiction in respect to said award.

"Because no judgment can be entered by this court upon said award."

On January 24, 1887, the plaintiffs filed a motion to amend the record by the issue of a rule of reference as of the day of the filing of said agreement, and on January 25, a motion for the acceptance of the award, and for judgment.

At the hearing on these motions, and on the objections of the defendant to the acceptance of the award, before *Bacon*, J., it appeared that in 1876 Sullivan was building a sewer under a contract with the city of Somerville; that he was indebted to the plaintiffs and to Swan for money lent to carry on the work, and for labor on the sewer, and had given assignments to Swan, and to the plaintiffs jointly, of the whole sum coming to him from the city of Somerville, to secure what he owed them; that the amount due from the city was settled by suit, and the whole sum due, which was $23,160, was paid to Swan on an execution issued in his name, which execution was

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so issued by agreement and consent of the plaintiffs and of Sullivan.

The plaintiffs offered to prove the acts and declarations of the parties, as tending to show their understanding that the hearings before the referee were had under a rule of court; and also offered to prove by the referee the same declarations, and that he heard the case understanding that he was acting as referee under a rule of court.

The judge ruled that he had no power to amend the record by ordering the issue of a rule of reference as of the date of the filing of said agreement, and refused for that reason, and not as matter of discretion, to grant the plaintiffs' motion for such rule; and held, as matter of law, that said report could not be accepted, nor judgment ordered thereon. The judge further ruled that the agreement of reference was a submission *in pais*, and did not entitle the plaintiffs to judgment upon the award, and that it worked a discontinuance of the action; and he ordered judgment therein as on a discontinuance, and reported the case for the determination of this court.

S. Lincoln & C. U. Bell, (*J. P. Sweeney* with them,) for the plaintiffs.

W. S. Knox & A. C. Stone, for the defendant.

C. ALLEN, J. 1. The agreement of reference did not have the effect to discontinue the plaintiffs' action. It was not intended to take effect as a submission *in pais;* but as a reference in court. It is entitled as an agreement in the action which was pending between the plaintiffs and the defendant in the Superior Court. It is stated to be a submission "in the above entitled action." The referee was to "report to said court." Final judgment was to be entered in this action, upon the coming in of the referee's report. The whole phraseology of the agreement contemplated a reference as a step in the action, and as a means of determining the judgment to be entered in the action. The agreement therefore could not take effect as an agreement for a reference *in pais*, which would work a discontinuance of the action. Such was not the intention of the parties.

2. Sullivan was no party to the action, nor could he be. There was no pretence of an indebtedness of the defendant to the plaintiffs and Sullivan jointly. The claims of the plaintiffs

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and of Sullivan grew out of the same matter, but they were in law distinct. Nor was there any agreement of parties by which the plaintiffs should be substituted as creditors of Swan, in place of Sullivan. Sullivan did not release Swan. Swan did not promise to pay to the plaintiffs whatever sum he might owe Sullivan. It was merely an agreement that the amount due to Sullivan, if any, should be ascertained, and included in a judgment in favor of the plaintiffs, but if nothing should be found due either to Sullivan or to the plaintiffs, then judgment should be entered for Swan, which judgment should have the same effect as though Sullivan were a party plaintiff. Under this agreement, if the referee should find that something was due to the plaintiffs, but that nothing was due to Sullivan, the plaintiffs would have judgment for the sum so found due to them; but no judgment could be rendered against Sullivan, and the stipulation did not include this contingency. It was contemplated by the parties that the claims of the plaintiffs and of Sullivan should be treated and passed upon separately, and they were so treated and passed upon. This agreement falls short of constituting a substitution or novation of parties; 2 Chit. Con. (11th Am. ed.) 1374; *Derby* v. *Sanford*, 9 Cush. 263; and indeed it has not been contended otherwise in argument.

The effect of the agreement, therefore, was that the referee should hear and pass upon a new and separate cause of action, held by one who was not and could not be a party to the record, and make report thereon to the court. If application had been seasonably made to the court for a rule of reference upon this agreement, such rule could not properly have been issued, because neither Sullivan nor his claim was or could be before the court. *Porter* v. *Dickerman*, 11 Gray, 482. The court could not give effect to such an agreement. A reference under rule of court cannot properly embrace the claim of a party not before the court. Nothing short of an agreement which would amount to a novation, by which the plaintiffs should be substituted for Sullivan as creditors of Swan, to all intents and purposes, and the claim of Sullivan extinguished, would enable the plaintiffs to declare in their own names upon this claim against the defendant, and to amend their pleadings by adding this new cause of action. Nothing short of this would make it proper to issue

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a rule of reference embracing the claim of Sullivan. None of the cases heretofore decided have gone further than to hold that other matters of controversy between the parties to the action may be included in a submission under a rule of court. *Berkshire Woollen Co.* v. *Day*, 12 Cush. 128. *Commonwealth* v. *Pejepscut Proprietors*, 7 Mass. 399, 417. *Haskell* v. *Whitney*, 12 Mass. 47. The agreement of the parties in this case, as in *Foster* v. *Durant*, 2 Cush. 544, cannot be carried into effect according to the rules of law.

It is objected by the defendant, that a rule of reference should not be issued *nunc pro tunc*, even if it might properly have been issued before the hearing; but we do not need to go into that question, being of opinion that it could not properly have been issued at the outset.

The result is, that the judgment for the defendant must be reversed, that a rule of reference under the agreement must be refused, and that the case stand for further proceedings.

Judgment reversed.

MARY E. STANTON *vs.* CITY OF SALEM.

Essex. Nov. 2, 1887. — Jan. 4, 1888. DEVENS & KNOWLTON, JJ., absent.

In an action against a city for personal injuries sustained by an alleged defect in a highway, the plaintiff testified, that, while walking on a sidewalk in the city, he struck his foot against some ice on the sidewalk which projected about two inches above the sidewalk, fell, and received the injuries complained of; and that the ice was hobbly, and had the marks of footprints upon it. A witness, who examined the ice the next day, testified that it was about three feet in length, and a foot and a half wide; that the edge, against which the plaintiff testified that he struck his foot, was such as would be formed by anything wearing away a perpendicular surface; and that the ice had apparently been left, when other ice on the sidewalk had been cut away. There was also evidence that snow had fallen on the third, fourth, and fifth days before the accident, but not on the day of the accident or on the day before. *Held*, that there was no evidence to be submitted to the jury on the question whether the proper officers of the city might, by the exercise of reasonable care and diligence, have had knowledge of the defect in time to have remedied it.

TORT, for personal injuries sustained by the plaintiff, a minor, by falling on a sidewalk on Winter Street in the city of Salem.

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Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff testified as follows: "About nine o'clock on Monday morning, December 21, 1885, I was walking on the sidewalk in front of the dwelling-house occupied by George R. Jewett, No. 24 Winter Street in Salem. I struck my foot against a piece of ice which projected above the level of the sidewalk about two inches, and fell down and sprained my ankle. A small gutter crossed the sidewalk where I fell, and the ice was on the side of the gutter nearest the Common. After I fell, a lady assisted me up, and I sat on the stone steps in front of the Jewett house, which steps are about four feet from where I fell. I remained on the steps for a half-hour, and noticed the condition of the ice on the sidewalk. It was about two inches thick, and longer than it was broad. The top or surface of the ice was very hobbly."

On cross-examination, she testified as follows: "There was a little ice in the gutter which crossed the sidewalk in front of the Jewett house. The streets were very frosty that morning, and very slippery. I was walking in the middle of the sidewalk. I fell just before I got to the steps in front of the Jewett house. The gutter is very near the steps. I fell after I passed the gutter. I am sure I crossed the gutter because the ice that I struck my foot against was on that side (the Common side) of the gutter. I noticed the ice after I fell. The ice was on the bricks on the side of the gutter. I did not see any ice before I fell. I looked at the ice after I fell. While sitting on the steps I noticed the condition of the ice. It was very hobbly, as if some one had trampled on it. Foot-prints and marks of shoes were on it. The ice looked as though it had been left there, and had not been shovelled."

It was admitted that the sidewalk was of proper construction and width, of no unusual slope, and was of brick; and that, except as herein stated, it was entirely clear of snow and ice.

Charles H. Gilbert, a hack-driver, called by the plaintiff, testified as follows: "I went to Winter Street, Salem, about half-past nine on Monday, December 21, 1885. I found the plaintiff sitting on the steps in front of the Jewett house on Winter Street. I got another man, and we took the plaintiff

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in our arms and carried her into the coach. I drove her to her house in Beverly. My attention was called by a lady to the place; there was a little ice there; I could not swear how long or how thick it was; perhaps the ice ran half-way down the sidewalk. The ice was a little rough, as if somebody had been kind of chopping it up and had left it there."

William J. Berry, a civil engineer, testified that on Tuesday, December 22, 1885, being the day after the accident, about one o'clock P. M., he went in company with the plaintiff's counsel for the purpose of making measurements of the sidewalk where the alleged accident happened; that he found a stone gutter leading from the westerly corner of the Jewett house crossing the sidewalk; that the sidewalk was clear of snow and ice in front of the Jewett house, showing the bricks, with the exception of a small piece of ice which was on the easterly side of the stone gutter; that the ice was three feet in length on the gutter, that is, across the sidewalk on the stone gutter, and it was a foot and a half in the direction toward the Common, that would be perpendicular to the gutter, and the outline of it was roughly irregular between the measurements taken across it, roughly circular joining those points; that the position of it was about the middle of the sidewalk.

On cross-examination, he testified that his impression was that it was quite cold, thawing in the sun, and quite cold in the shade; that the streets were wet except in some places, and water was coming off the eaves of the Jewett house; that the gutter was clear; that he did not notice any water falling upon the sidewalk in front of the Jewett house; that there could not be any doubt but that the ice was left on the sidewalk after ice had been cut off the sidewalk; that the ice was one inch and a half at the thickest point; that it started level with the edge of the gutter, and then it rose rapidly and sharply for possibly two or three inches of its length, and then it was substantially level out towards the centre, and the greatest depth of the ice was one inch and a half; and that the edge was such an edge as would be formed by anything wearing away a perpendicular surface.

The plaintiff put in evidence a notice served upon the defendant within thirty days of said injury, stating the time, place,

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and cause of the injury as required by law; and also put in evidence the weather record kept at the police station in Salem, showing that it was snowing at ten o'clock in the evening of December 17, 1885, at one o'clock and at five o'clock in the morning of the 18th, and at five o'clock in the morning of the 19th; and that the weather was clear or cloudy on the 20th and the 21st until sunset, when there was snow.

At the close of the plaintiff's case, the defendant asked the judge to rule that the action could not be maintained. The judge so ruled. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

D. W. Quill, for the plaintiff.

F. L. Evans, for the defendant.

MORTON, C. J. In an action brought under the Pub. Sts. c. 52, § 18, the burden is upon the plaintiff to show, not only a defect in a highway, but also that the defect was one which the proper officers either had knowledge of, or, by the exercise of reasonable care and diligence, might have had knowledge of, in time to have remedied it or to have prevented the injury complained of. *Hanscom* v. *Boston*, 141 Mass. 242, and cases cited.

In the case at bar, the plaintiff was injured by stepping upon ice about two inches thick which had formed upon the sidewalk. If we assume this to have been a defect, there is no evidence in the case as to how it was formed, or how long it had existed. No witness saw it before the accident, and there was no evidence to show that any officer of the city either knew of it, or could, by reasonable diligence, have known of it, before the injury to the plaintiff. She failed to meet the burden of proving her case, and the court rightly directed a verdict for the defendant. *Exceptions overruled.*

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WILLIAM D. PICKMAN & another, trustees, *vs.* INHABITANTS OF PEABODY.

Essex. Nov. 2, 1887. — Jan. 4, 1888. DEVENS & KNOWLTON, JJ., absent.

The charter of a corporation authorized it to convey water by subterraneous pipes to a certain town. A subsequent act authorized it to conduct by subterranean pipes into their own land the waters of certain ponds, for the purposes for which the original charter was granted, and, for said purposes, to "construct, lay down, and maintain any dam or dams, pipes, fountains, or reservoirs, whatsoever, upon and over any land whatsoever." The statute also provided a remedy for any person injured "by the taking the water aforesaid." *Held*, that the corporation had no power to take the land of a third person and build a dam upon it.

HOLMES, J. This is an action of tort for entering and building a dam upon the plaintiff's land, and for flowing other land belonging to the plaintiff, on the borders of Spring Pond, in Peabody, Salem, and Lynn. The defendant, as allowed by the Sts. of 1870, *c.* 93, § 1, and 1873, *c.* 255, (Pub. Sts. *c.* 27, § 27,) has purchased all the rights and franchises of the proprietors of the Salem and Danvers Aqueduct, and justifies under the acts giving that corporation its powers (namely, Sts. 1796, *c.* 76; 1839, *c.* 114; 1850, *c.* 273); and also under the St. of 1881, *c.* 171; and sets up that the remedy, if any, is by petition under those acts.

The St. of 1881, *c.* 171, may be laid out of the case, because, if the authority given by that act applies to any of the acts complained of, we must assume that it was not pursued, as no description of the lands taken for the dam or by flowing was filed, as required by § 5. *Kenison* v. *Arlington*, 144 Mass. 456. Of the other acts mentioned, the St. of 1850, *c.* 273, is the only one relied on as authorizing what the defendant has done.

The first section of the St. of 1850 is as follows: "The said corporation are hereby empowered to conduct by subterranean pipes, into their own land in Salem and Danvers, the waters of Spring Pond and Brown's Pond, so called, and also the waters of the brook in the towns of Danvers and Salem, now dammed by said aqueduct corporation, which they now have, or may

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acquire the right to take and use, for the purposes and objects for which the original charter was granted; and for said purposes may construct, lay down, and maintain any dam or dams, pipes, fountains, or reservoirs, whatsoever, upon and over any land whatsoever, subject to the following provisions hereinafter continued." Section 2 provides a remedy "if any person or corporation shall suffer damage by the taking the water aforesaid." No other remedies are provided, and the remaining sections are immaterial. See *Fay* v. *Salem & Danvers Aqueduct*, 9 Allen, 577; *Fay* v. *Salem & Danvers Aqueduct*, 111 Mass. 27.

The authority to construct dams upon any land whatsoever "for said purposes," that is, it would seem, "for the purposes for which the original charter was granted," is broadly expressed, but upon a consideration of the whole section, and of what was done under it at the time, we are of opinion that it does not justify the defendant's acts.

The purpose for which the original charter was granted is that of "conveying fresh water by subterraneous pipes into the towns of Salem and Danvers." St. 1796, *c.* 76, § 1. The power given by the St. of 1850, so far as it expressly touches the pond, is to conduct off its waters by subterranean pipes. It hardly can have been deemed necessary to dam the pond, still less to raise it above its natural level, as has been done, in order to carry off its water in this way. The only purpose contemplated by the act for which there was any apparent need of dams was to build reservoirs. The reservoirs contemplated by the act would seem to be reservoirs upon the corporation's own land, as the power given is to conduct the waters "into their own land." Nothing is said about flowing land of other people. The only provision for compensation is for damage by taking the water. When the act was passed, the company simply built a series of reservoirs on its own land, and thus things remained until 1882. It seems to us more reasonable to construe the power to build dams as limited to the scheme contemplated and carried out, and by the absence of express powers to flow and of provisions for damages caused by flowing, rather than to extend by implication the powers to flow and the remedies for the damage caused by their exercise so as to admit a right to build dams and

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sluiceways at the mouth of the pond, and to carry out a new scheme which plainly never entered the mind of the Legislature. *Judgment set aside, and case to stand for trial.*

J. G. Abbott & C. G. Saunders, for the plaintiffs.

H. Wardwell, for the defendant.

WILLIAM HALE *vs.* LEONARD V. SPAULDING & others.

Essex. Nov. 8, 1887. — Jan. 4, 1888. DEVENS & KNOWLTON, JJ., absent.

A receipt, under seal, given by the obligee of a joint obligation to one of the joint obligors, "in full satisfaction for his liability" on said joint obligation, releases all of the obligors; and oral evidence is inadmissible to show that the obligee did not intend to release them all.

CONTRACT, upon an instrument under seal, dated May 23, 1885, by the terms of which the defendants, six in number, agreed to pay to the plaintiff, on demand, six sevenths of any loss to which he might be subjected as the indorser of a certain note for a corporation.

Aaron H. Saltmarsh alone defended. He filed an answer alleging that the plaintiff, since the execution of the contract declared on, had executed and delivered the following paper, under seal, to one of the joint obligors under the contract:

"Received of L. V. Spaulding $1060.84, in full satisfaction for his liability on the document" signed, &c., and dated May 23, 1885.

At the trial in the Superior Court, before *Hammond*, J., it appeared that on September 20, 1886, the defendants, except Saltmarsh, settled with the plaintiff for their proportionate part of the amount alleged to be due under the agreement declared on, and the plaintiff executed the paper under seal, annexed to the answer, and delivered it to the defendant Spaulding. The plaintiff offered to prove facts showing that, in giving said sealed paper annexed to the answer, there was no intention of releasing the defendant Saltmarsh. The judge ruled that said offer was

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not material, and that said sealed paper released the defendant Saltmarsh, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. H. Moody, for the plaintiff.

H. N. Merrill, for Saltmarsh.

C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule, that a release to one joint obligor releases all. *Wiggin* v. *Tudor*, 23 Pick. 434, 444. *Goodnow* v. *Smith*, 18 Pick. 414. *Pond* v. *Williams*, 1 Gray, 630, 636. But this result is avoided when the instrument is so drawn as to show a contrary intention. 1 Lindl. Part. 438. 2 Chit. Con. (11th Am. ed.) 1154 *& seq.* *Ex parte Good*, 5 Ch. D. 46, 55. The difficulty with the plaintiff's case is, that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose; or the instrument is put in the form of a covenant not to sue. See *Kenworthy* v. *Sawyer*, 125 Mass. 28; *Willis* v. *De Castro*, 4 C. B. (N. S.) 216; *North* v. *Wakefield*, 13 Q. B. 536, 541. Parol evidence to show the actual intention is incompetent. *Tuckerman* v. *Newhall*, 17 Mass. 580, 585. The instrument given in this case was a mere receipt under seal of money from one of several joint obligors, in full satisfaction for his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.

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LYDIA J. ABBOTT *vs.* INHABITANTS OF NORTH ANDOVER.

Essex. Nov. 4, 1887. — Jan. 4, 1888. DEVENS & KNOWLTON, JJ., absent.

Under the St. of 1875, c. 209, a town treasurer has no right, *virtute officii*, to give a new note of the town in renewal of an old note; and the town is not bound by his assurances as to his authority, or by any custom or usage on his part to act without authority.

If the holder of a valid promissory note, signed in behalf of the town by its treasurer, surrenders it to the treasurer and takes from him a new note in renewal, on his assurance that he has authority to bind the town by the renewal, when, in fact, he has not such authority, the treasurer's conduct is not a fraudulent concealment by the town of the cause of action, within the Pub. Sts. c. 197, § 14, and an action cannot be maintained on the old note, which is not brought within six years after the cause of action upon it accrued.

CONTRACT. Writ dated April 14, 1886. The declaration contained two counts. The first count was on the following promissory note:

"$ 5400. North Andover, May 3, 1879.

One year after date, for value received, the town of North Andover, in the county of Essex and Commonwealth of Massachusetts, by their treasurer duly authorized, promise to pay to the order of Mrs. Lydia J. Abbott the sum of fifty-four hundred dollars, with interest at the rate of seven per cent per annum. Andrew Smith, treasurer."

The second count was on an account annexed for money lent by the plaintiff to the defendant in the years 1872, 1873, 1875, and 1876, with interest thereon.

At the trial in the Superior Court, before *Hammond*, J., Asa H. Abbott testified that, acting as the agent of the plaintiff, he lent the money set forth in the second count to the treasurer of the town of North Andover for the use of the town, the treasurer representing that he was authorized by the selectmen to borrow the money, and that promissory notes were given by the treasurer for the money so lent. Abbott further testified, that the amount stated in the note set forth in the first count was the aggregate of the amounts of the previous notes, with interest, and that when Smith gave that note he made the same representations as to his authority.

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There was also other evidence, the nature of which appears in the opinion.

On all the evidence, the judge ruled that the action could not be maintained, and directed a verdict for the defendant. The plaintiff alleged exceptions.

W. S. Knox & J. C. Sanborn, (*J. R. Poor* with them,) for the plaintiff.

E. T. Burley & C. U. Bell, for the defendant.

C. ALLEN, J. The note of May 3, 1879, cannot be supported as a valid indebtedness of the town. The St. of 1875, *c.* 209, which was then in force, provided that no debts should thereafter be incurred by any town, except, 1. for temporary loans in anticipation of the taxes for the year in which such debts are incurred, and of the year next ensuing, and expressly made payable therefrom by vote of the said city or town; 2. debts incurred by a vote of two thirds of the legal voters present and voting at a legal meeting; or, 3. debts contracted for purposes for which towns may lawfully expend money. The present note did not fall within either of these classes. It was given in place of similar notes held by the plaintiff in the various years from 1872 to 1876 inclusive. The plaintiff contends that the greater part of these earlier notes were given for money borrowed by the town prior to the passage of the St. of 1875, on legal votes of the town, and also that the last of these notes, given in 1876, was legal, and that, being legal obligations of the town, these formed a good consideration for the later note, and that the town treasurer had a right at their maturity to take them up, or pay them, by giving another note in place of them, or in some form to continue and renew the liability of the town to pay them. But, even assuming the premises, the difficulty with this argument is that the new note was a new and independent contract. It is nothing to say that it was founded on a good consideration. Debts founded on good considerations are within the prohibition of the statute. It is difficult to see how the town itself could give a new note in renewal of an old one, for borrowed money, without a two-thirds vote. But we need not go so far as that. Clearly, a town treasurer, *virtute officii*, has no right to give new notes in the place of old ones. His authority to bind the town springs only from legal votes of the

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town; and he cannot enlarge his actual authority by assurances, whether made fraudulently or in good faith, as to the extent of it, or by any custom or usage to act without authority. *Agawam Bank* v. *South Hadley*, 128 Mass. 503, 506, and cases cited. A new note is a new contract, and, if valid, creates a new liability. It is not merely an admission of an existing debt, but it is the creation of a new liability. It has been often held or declared that this is beyond a partner's power, after dissolution. *Bell* v. *Morrison*, 1 Pet. 351, 373. *Hall* v. *Lanning*, 91 U. S. 160, 170. 1 Lind. Part. 408–412. Story Part. (7th ed.) § 322 and note. *Lumberman's Bank* v. *Pratt*, 51 Maine, 563. However this may be, a town treasurer has no such authority. *Lowell Five Cents Savings Bank* v. *Winchester*, 8 Allen, 109. The nature of his agency does not enable him to enter into contracts for his principal, unless specially authorized. The vote of the town in 1879 authorized him "to hire money for the use of the town when necessary, upon the approval of the selectmen." This had no reference to renewing existing notes. There is no aspect in which the note of May 3, 1879, can be upheld as valid.

This being so, all earlier indebtedness, if ever valid, is barred by the statute of limitations. There was no fraudulent concealment by the defendant of the plaintiff's cause of action, within the Pub. Sts. *c.* 197, § 14. Upon this point, it is sufficient to say that the town was not responsible for the fraud of its treasurer. *Exceptions overruled.*

JOSIAH D. RICHARDS *vs.* BERNARD GAUFFRET & another.

Bristol. Nov. 19, 1887. — Jan. 4, 1888. W. ALLEN, J., absent.

The owner of a mill-pond executed an instrument under seal, whereby he leased, demised, and let "the sole and exclusive right to cut and carry away" from said pond "all such ice as can be so cut in form and shape to use either for private use or as merchandise," the lessor reserving to himself the right to cut all ice needed for his own use. *Held*, that the interest of the lessee was not a mere revocable license, and that he could maintain an action against one who, without right, entered upon the pond, and cut ice therefrom.

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TORT, in three counts. The first count was for breaking and entering the plaintiff's close in Attleborough, known as the Falls Pond, and cutting and carrying away five thousand tons of ice, the property of the plaintiff. The second count was as follows: "And the plaintiff says that on the first day of January, 1887, he had and held, and now has and holds, and has so had and held since said first day of January, 1887, till the present time, the sole and exclusive right to cut and carry from the Falls Pond — the close described in the first count — all the ice formed or forming on said pond; and the defendants, in violation of the plaintiff's said rights, entered upon said pond and cut and carried away therefrom five thousand tons of ice, the property of the plaintiff." The third count was for the conversion of five thousand tons of ice, the property of the plaintiff. Answer, a general denial.

Trial in the Superior Court, without a jury, before *Mason*, J., who allowed a bill of exceptions, which, after stating that the pleadings formed part thereof, was in substance as follows:

The defendants took ice from the pond as alleged, but did not actually interfere with the plaintiff's taking ice from said pond, and the plaintiff made no attempt to take ice from said pond, except a small quantity to fill the private ice-house of his lessor.

The pond from which the ice was cut was a large mill-pond, covering about one hundred and fifty acres, owned by Handel N. Daggett, who had obtained his title to the soil or land under the water in said pond by various mesne conveyances, giving him the fee of the same.

On January 1, 1887, Daggett, by an instrument under seal, leased, demised, and let to the plaintiff, for the term of one year from that date, "the sole and exclusive right to cut and carry away from the Falls Pond, so called, ... all such ice as can be so cut in form and shape to use either for private use or as merchandise." The lease also contained this provision: "The lessor may cut all ice needed for his own use from and off said pond."

The plaintiff asked the judge to rule, that, under this lease, if the defendants entered upon the pond, and cut and carried away ice therefrom, the plaintiff was entitled to recover in this action. The judge refused so to rule.

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The defendants asked the judge to rule, that the lease had no other effect than as a license to the plaintiff to cut and carry away the ice from said pond; that it conveyed no interest in the premises to him; that he acquired no title to any ice in the pond under it until the same was cut and taken possession of by him; and that he could not maintain this action upon any of the counts in the declaration.

The judge so ruled, and found for the defendants. The plaintiff alleged exceptions.

E. Avery & J. E. Pond, for the plaintiff.

H. J. Fuller, for the defendants.

MORTON, C. J. Daggett as owner of the pond had the right to dispose of the water and of the ice which might be formed upon it, and there can be no doubt that it was the purpose of the indenture to transfer to the plaintiff the sole and exclusive right to cut and use, or sell, all such ice, except what the lessor needed for his private use. *Paine* v. *Woods*, 108 Mass. 160, 173. By the lease, therefore, the plaintiff acquired a valuable right, and it would be a reproach to the law if it did not furnish him a remedy for an unlawful encroachment upon this right by a stranger.

It is not necessary to discuss the somewhat nice questions whether the plaintiff had such an interest in the land that he could bring trespass *quare clausum*, or whether he had such property in the ice that he could maintain an action of trover against the defendants. He had an interest greater than a mere revocable license, and could bring an action against Daggett if he interfered with his rights under the lease; he had, as we have said, a valuable right, and, if a stranger unlawfully encroached upon this right, we can see no reason why he might not maintain a proper action therefor.

The second count of the plaintiff's declaration substantially sets out his rights, and the violation of them by the defendants; and we are of opinion that, under it, the plaintiff may recover such damages as he shows he has sustained by reason of such unlawful violation of his rights. *Exceptions sustained.*

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JAMES C. EDDY & others, executors, *vs.* WALTER S. ADAMS, administrator.

Bristol. Nov. 19, 1887. — Jan. 4, 1888. W. ALLEN, J., absent.

A. made a promissory note, dated May 25, 1878, and payable to B. one year from date. A. died on March 31, 1884, and an administrator was appointed and gave bond on April 7, 1884. Said administrator resigned, and an administrator *de bonis non* was appointed on April 6, 1885. *Held*, in an action on the note against the administrator *de bonis non*, brought on April 5, 1887, that the action was brought within the time allowed by the Pub. Sts. c. 136, § 17, and was not barred by the statute of limitations.

HOLMES, J. This is an action on a promissory note made by the defendant's intestate on May 25, 1878, payable to the plaintiffs' testator in one year, which therefore would have been barred by the statute of limitations after May 28, 1885, if the maker and payee had both lived so long. The maker died, however, on March 31, 1884, and one Boynton was appointed his administrator, and gave bond on April 7, 1884. If Boynton had remained administrator, the note would have been barred after April 7, 1886. Pub. Sts. *c.* 197, § 12; *c.* 136, § 9. But Boynton resigned, and the defendant was appointed administrator *de bonis non* on April 6, 1885. The plaintiff's testator died on April 19, 1886, and the plaintiffs were duly appointed executors on June 4, 1886. The writ in this action is dated April 5, 1887.

1. The defendant contends that Boynton's resignation makes no difference in the running of the special statute of limitations in favor of executors and administrators; that the language of the Pub. Sts. *c.* 197, § 12, allows the action to be brought only within two years after "the grant" of letters of administration, and that the word "the" can only refer to the original grant, and thus that the time within which this action could be brought ended April 7, 1886. But we think it perfectly clear that this section, so far as it expresses a limit and not an extension of the time for suing, is simply a general statement of the rule for the ordinary case where the same person remains administrator for two years, that the general rule is more specifically stated in the Pub. Sts. *c.* 136, § 9, and that neither section is

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inconsistent with or qualifies the express provisions for cases like the present in *c.* 136, § 17, which apply in terms, and allow an action within two years from the defendant's giving bond. The special statute of limitations overrides the general statute, and sometimes abridges and sometimes extends the period of liability. But it cannot have been intended to bar an action by the lapse of the time during which it provides that the administrator shall not be held to answer to a suit. Section 1 of the Pub. Sts. *c.* 136, applies to administrators *de bonis non*, as well as to others, and is a bar to an action prematurely commenced. Therefore, on the defendant's contention, the plaintiffs had only one day, April 7, 1886, on which they could have sued within the two years from Boynton's giving bond, and by a little contrivance could have been prevented from suing at all.

2. It does not appear that the estate had been exhausted in paying preferred claims, so that the action is barred by the Pub. Sts. *c.* 136, § 5. The exceptions state that there was evidence that there were funds of the estate in the hands of Boynton's agent which were not included in his inventory or account, and several of the claims paid do not appear to have been preferred claims. See also *Cushing* v. *Field*, 9 Met. 180.

Defendant's exceptions overruled.

J. M. Morton & A. J. Jennings, for the plaintiffs.

J. C. Coombs & J. V. Beal, for the defendant.

JOB T. WILSON *vs.* JAMES H. WILSON.

Bristol. Oct. 26, 1887. — Jan. 5, 1888. C. ALLEN & KNOWLTON, JJ., absent.

A woman devised the greater part of her estate to her son and two other persons, in trust that they "may, in the exercise of their discretion, pay" to her husband such portion of the income, "or no portion at all thereof, as they shall from time to time think fitting and proper," and, further, to invest the surplus income, and, at the death of the husband, to convey one half of the trust estate to the daughter of the testatrix or her issue, or, if she should leave no issue, then to the issue of the son, and, at the death of the son, to convey the other half to the issue of the son. The will further provided, that, if either of the recipients under the will

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should be wanting in thrift, the trustees should make the payments provided for in such way and to such persons as should be most likely to enure to the benefit of the recipients, "exercising in all such case and cases the judgment that would be expected from a good father to each of such recipients respectively." On a petition by the husband for the removal of the son from the office of trustee, a single justice of this court, before whom the hearing was had, found that the son was the dominant member of the board of trustees; that there was a strong mutual hostility between the son and the husband; that he could not satisfactorily apportion the blame for the quarrel, and did not find any misconduct of the son distinctly attributable to hostility; and that, in view of the absolute discretion reposed in the trustees as to the allowance to the husband, and the whole state of affairs disclosed by the evidence, the son ought to be removed, if the husband had a *locus standi*, and unless mutual hostility not attributable solely to the trustee, without distinct proof of misconduct in consequence of it, is never a sufficient ground of removal in such a case. The judge on these findings reported the case for the consideration of the full court. *Held*, that the husband was "beneficially interested in the trust," within the Pub. Sts. *c.* 141, § 9, and had a right to bring the petition; and that, on the facts found, the trustee ought to be removed.

APPEAL from a decree of the Probate Court, allowing a petition filed by Job T. Wilson, praying for the removal of James H. Wilson, one of the trustees under the will of Deborah Wilson. The case was heard by *Holmes*, J., and reserved for the consideration of the full court. The facts appear in the opinion.

J. M. Wood, for the petitioner.

J. M. Morton, for the respondent.

MORTON, C. J. The will of the testatrix, who was the wife of the petitioner, gives the most of her estate to the respondent and two others, upon the trust that they "may, in the exercise of their discretion, pay" to the petitioner such portion of the income, "or no portion at all thereof, as they shall from time to time think fitting and proper," shall invest the surplus income for accumulation, and at the death of the petitioner shall convey one half of the trust estate to her daughter or her issue, or, if she leaves no issue, to the issue of the respondent, and shall hold the other half in trust until the death of the respondent, when it shall be conveyed to his issue. It also provides in the last clause, that, "if either of the recipients under this will, husband, children, or grandchildren, or children's issue, shall be wanting in thrift," the trustees are ordered and charged with making the conveyances and payments before provided in such way and to such persons as shall be most likely to enure to the benefit of the recipients, "exercising in all such case and cases

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the judgment that would be expected from a good father to each of such recipients respectively."

The will contemplates that a part of the income is to be applied to the benefit of the petitioner, unless some cause exists to the contrary. Although the discretion given to the trustees is very broad, yet they are to act upon their discretion and judgment, not upon their mere will or caprice, or from selfish or improper motives; they are to exercise the judgment to be expected from a good father.

The petitioner has a right to demand of them that, in determining how much of the income should be paid to him or for his benefit, they should exercise a fair and reasonable discretion and judgment; and if they unfairly or corruptly refuse to do this, he is a party "beneficially interested in the trust," who, under the statute, may apply for the removal of the trustees. Pub. Sts. *c.* 141, § 9.

We come, then, to the merits of the case.

The statute provides that the Supreme Judicial Court and the probate courts may, "upon application of the parties beneficially interested in the trust, remove a trustee under a written instrument, if such removal appears essential to the interests of the applicants." Pub. Sts. *c.* 141, § 9. This gives a broad power to the court, and leaves the question of the removal of a trustee very largely to its discretion.

In this case the justice who heard the case upon appeal from the Probate Court has not reported the evidence; we cannot, therefore, revise his findings. He has found, as the result of the hearing, that the respondent is the dominant member of the board of trustees appointed by the will, that there exists a strong mutual hostility between the respondent and the petitioner, who is his father, that he cannot satisfactorily apportion the blame for the existing quarrel, and that he does not find any misconduct of the trustee distinctly attributable to hostility. But he finds that "in view of the absolute discretion reposed in the trustees as to the allowance to the petitioner, and the whole state of affairs disclosed by the evidence, the trustee ought to be removed, if the petitioner has a *locus standi*, and unless mutual hostility not attributable solely to the trustee, without distinct proof of misconduct in consequence of it, is never a

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sufficient ground of removal in a case like the present." This is equivalent to a finding by the justice that the respondent ought to be removed, unless, upon the facts in the case, the justice had no right in law to remove him.

We think it was within the province of the presiding justice to decide whether, upon all the evidence, the trustee should be removed. The relation between the father and the son created by the will is one of extreme delicacy. The trustees have full power to determine what allowance the father shall have, limited only by the duty of exercising a fair and reasonable discretion. Every one instinctively feels that a state of mutual hostility between the trustee and such a beneficiary, arising after the trust was created, caused in part by the fault of the trustee, unfits him, to a greater or less degree, for the fair execution of the trust. But from the nature of the case it would be very difficult, if not impossible, to find distinct proof that, in exercising his discretion, the trustee was actuated or influenced by such hostility. And yet it may be apparent that, according to the laws which generally govern human action, he could not be relied upon to act fairly towards the beneficiary. We think that in a case like this, where the duty of a trustee is so delicate, where the hostility has arisen since the trust was created, and is attributable in part to the fault of the trustee, where the existence of the hostility would naturally pervert his feelings and judgment, it is competent for a justice to remove a trustee without further proof of misconduct, upon the ground that the removal appears essential to the interests of the beneficiary.

In *McPherson* v. *Cox*, 96 U. S. 404, 419, Mr. Justice Miller states that, "where a trustee is charged with an active trust, which gives him some discretionary power over the rights of the *cestui que trust*, and which brings him into constant personal intercourse with the latter, it may be conceded that the mere existence of strong mutual ill-feeling between the parties will, under some circumstances, justify a change by the court." In *Scott* v. *Rand*, 118 Mass. 215, it is said in the opinion, that the question of removing a trustee depends upon "a careful consideration of all the circumstances, the existing relations, and to some extent the state of feeling between the parties. It is addressed

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to the reasonable discretion of the court." And the trustee was removed, although he had acted from honest motives, mainly upon the ground that, in a quarrel between the *cestui que trust* and her husband, he had taken the part of the husband, and thus created unfriendly relations with her.

The respondent relies upon the cases of *Forster* v. *Davies*, 4 DeG. F. & J. 133, and *Nickels* v. *Philips*, 18 Fla. 732. But they are quite different from the case at bar. It does not appear in those cases that any blame attached to the trustees for the existing feud or hostility; and the trustees had no discretionary power over the rights of the *cestuis que trust*, so that the existence of hostility was of minor importance, as it could not affect the due execution of the trust.

Decree of Probate Court affirmed.

MILON S. JENKINS *vs.* JOHN T. WOOD.

Essex. Nov. 3, 1887. — Jan. 5, 1888. DEVENS & KNOWLTON, absent.

An action of tort to recover the forfeiture prescribed in the Pub. Sts. c. 179, § 6, cannot be maintained where a tenant in common commits waste in good faith, under an honest belief that he is not a tenant in common.

TORT, under the Pub. Sts. *c.* 179, §§ 6, 7, to recover three times the amount of the damages to be assessed for the cutting of wood by the defendant, on land alleged to be owned by the plaintiff and the defendant as tenants in common.

The case was submitted to the Superior Court, and to this court, on appeal, on agreed facts, in substance as follows:

The defendant, at the time of the cutting, was a tenant in common of said land with the plaintiff, and did not give the notice to his cotenant provided in the Pub. Sts. *c.* 179, § 6. The damage to the whole land resulting from said cutting is $350.

The premises originally were the property of Sarah Wood, the wife of the defendant, who died on July 4, 1871, without leaving issue living. The defendant owns one undivided half

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of the premises, and the other half descended to the plaintiff, as heir of the said Sarah Wood.

A child was born during the existence of the marriage of the defendant and the said Sarah, and the defendant believed that this child was born alive, and that he was tenant by the curtesy of the undivided half of the premises, the remainder in which belonged to the plaintiff. So believing, the defendant cut the wood and timber.

After the cutting, the plaintiff brought a petition for partition of the said premises, in the Superior Court, against the defendant. Upon the trial of said petition, the defendant was a witness, and testified that he was present at the birth of the said child, and that it was born alive, and other witnesses testified upon the question in issue. It was determined that the child aforesaid was not born alive, and judgment for partition was entered. Subsequently to said judgment the present action was brought.

If the plaintiff was entitled to recover the forfeiture provided in the Pub. Sts. *c.* 179, § 6, judgment was to be entered for the plaintiff accordingly. If the plaintiff was not entitled to recover said forfeiture, but, in any form of action, could recover the actual damage occasioned by said cutting, judgment was to be entered for such damage.

The court ordered judgment for the plaintiff for the actual damage; and the plaintiff appealed to this court.

W. S. Knox, for the plaintiff.

C. G. Saunders, for the defendant.

MORTON, C. J. The statute provides that, "if a joint tenant, coparcener, or tenant in common of undivided lands cuts down, destroys, or carries away any trees, timber, wood, or underwood standing or lying on such lands, or digs up or carries away any stone, ore, or other valuable thing found there, or commits any other strip or waste, without first giving thirty days' notice in writing under his hand to all the other persons interested therein, or to their respective agents or attorneys, of his intention to enter upon and improve the land, or if he does any of said acts during the pendency of a petition or other suit for the partition of the premises, he shall forfeit three times the amount of the damages that shall be assessed therefor," to be

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recovered in an action of tort by his cotenant. Pub. Sts. *c.* 179, §§ 6, 7.

Although such action is not strictly an action for a penalty, (*Goodridge* v. *Rogers*, 22 Pick. 495,) yet the provisions of the statute are highly punitive or penal in their character, and should be strictly construed, and held to apply only to such cases as are clearly intended by the Legislature. *Adams* v. *Palmer*, 6 Gray, 338. *Byam* v. *Bickford*, 140 Mass. 31. Similar statutes have been in force for more than a century. St. 1783, *c.* 52, § 1. St. 1785, *c.* 62, § 1. Rev. Sts. *c.* 105, § 7. Gen. Sts. *c.* 138, § 7. Pub. Sts. *c.* 179, § 6.

We are of opinion that the Legislature intended that these statutes should apply only to cases of known and recognized tenancies in common or joint tenancies, and not to cases where a party enters upon land and cuts wood or timber under an honest claim that he owns the whole in fee, or by some other title than that of a tenant in common or joint tenant. If a man in good faith buys land, supposing that he gets a title in fee to the whole, and cuts wood from it, it is not to be presumed that the statute intended that he should be subject to the severe penalty of threefold the amount of damage done, if he afterwards discovers that he has a title only to an undivided portion instead of to the whole of the land. The object of the statutes is to enforce a penalty against tenants in common or joint tenants who knowingly encroach upon the rights of their cotenants. Before cutting wood or timber, they are to give notice to their cotenants of their intention to enter upon and improve the land, or, as it is expressed in the Sts. of 1783 and 1785, that they "have occasion for, and shall enter upon and improve such lot or lots of land lying in common." Such a notice could not be given by a person who did not know that he was a tenant in common, and the provision tends strongly to show that the object of the statute is to deal with cases of known and recognized tenancies in common.

A similar question was decided in *Reed* v. *Davis*, 8 Pick. 514. The St. of 1795, *c.* 75, § 3, provided that if any person should commence any action for recovering possession of land, and the person in possession, or any other person, pending such action, should make strip or waste, he should forfeit and pay treble

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damages. It was held that an action for the penalty could not be maintained against a person who did not know of the pendency of the action.

We are therefore of opinion, that, upon the facts agreed in this case, the plaintiff cannot maintain an action under the statute for the penalty; but, under the stipulation in the case stated, that, if the plaintiff can in any form of action recover the actual damage he has sustained, judgment is to be entered for such damage, the Superior Court rightly entered judgment for such damage. *Judgment affirmed.*

JOSEPH SIMPSON *vs.* ARTHUR D. STORY & another.

Essex. Nov. 4, 1887. — Jan. 5, 1888. DEVENS & KNOWLTON, JJ., absent.

The provisions of the U. S. St. of June 26, 1884, *c.* 121, § 18, providing that the individual liability of a shipowner shall be limited to the proportion of any and all debts and liabilities that his individual share of the vessel bears to the whole, do not apply to fishing vessels.

CONTRACT, against Arthur D. Story and Eli Wilson, on an account annexed, for the price of a mackerel seine, sold in 1885, and for work done on the same in that year and in May, 1886. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The seine was purchased, at Gloucester, of the plaintiff, by the defendant Wilson, for the use of the fishing schooner A. M. Burnham, of the burden of one hundred and fifteen tons, of said Gloucester, Wilson being the master of the vessel, and also being the owner of one half of it. The defendant Story owned the other half. The repairs on the seine were also ordered by Wilson.

Story alone defended, and contended that, if he was liable at all, he was, under the U. S. St. of June 26, 1884, *c.* 121, § 18,*

* This section provides that "the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabili-

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only liable for one half of the bill; and requested the judge so to instruct the jury.

The judge declined so to instruct the jury, but instructed them that, if Story authorized the purchase of the seine, or afterwards ratified such purchase, he was liable for the full amount of the plaintiff's bill.

The jury returned a verdict against Story for the full amount of the bill; and he alleged exceptions.

C. A. Russell, for Story.

W. A. Pew, Jr., for the plaintiff.

C. ALLEN, J. In construing an act of Congress, the title of the act, the objects to be accomplished, the other provisions found in connection with those under especial consideration, the provisions and arrangement of the statutes which were amended, the mode in which the embarrassing words were introduced, as shown by the journals and records, the history of the times, and especially of prior legislation upon the same general subject, may all be considered. *Myer* v. *Car Co.* 102 U. S. 1, 11. *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79, 82. *Hadden* v. *The Collector*, 5 Wall. 107, 110. *Blake* v. *National Banks*, 23 Wall. 307, 319. See also *Field* v. *Gooding*, 106 Mass. 310, 313; *Commonwealth* v. *Bank of Mutual Redemption*, 4 Allen, 1, 13; *Holbrook* v. *Holbrook*, 1 Pick. 248. Looking at the statute now under consideration, U. S. St. of June 26, 1884, *c.* 121, § 18, in this manner, it appears that it was not the design of Congress to include fishing vessels within its provisions. Its title is, "An act to remove certain burdens on the American merchant marine, and encourage the American foreign carrying trade and for other purposes." The object of the prior legislation which was amended, as well as of the act in question, was to promote the building of ships, and to encourage persons engaged in the business of navigation, with special reference to the foreign carrying trade; so that American vessels might enter into this trade in competition with foreign vessels, and on more nearly the same

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ties of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending; provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners."

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terms. See *Moore* v. *American Transportation Co.* 24 How. 1; *Walker* v. *Transportation Co.* 3 Wall. 150. This is shown by the whole history of the legislation, and by the course of the discussions in Congress. See Cong. Record, 48th Congress. American vessels were subject to burdens which foreign vessels were free from; and all the other sections of the statute had reference to the removal of such burdens. Section 18 was not in the original bill introduced in the House of Representatives, but it is found in substance in a bill introduced in the Senate, which proceeded concurrently with that in the House; and it was retained in the report of a joint committee of conference. Prior statutes had established an exemption or limitation of responsibility for losses by fire, embezzlement, and otherwise, but they did not include any exemption in respect to debts; and similar limitations existed in foreign countries. U. S. St. 1851, *c.* 43, §§ 1–4. U. S. Rev. Sts. §§ 4282–4284. *The Scotland*, 105 U. S. 24. *Norwich Co.* v. *Wright*, 13 Wall. 104. *The Rebecca*, 1 Ware, 188. A similar statute had long existed in Massachusetts. St. 1818, *c.* 122. Rev. Sts. *c.* 32, §§ 1–4. Except as thus limited, the responsibility of joint owners of vessels was joint; while the *delectus personarum* of a partnership did not exist, since one joint owner could transfer his share in the vessel without the consent of the others. A vessel engaged in foreign trade is liable to be away from home for long periods of time, under the control of agents. Section 18 sought to place the owners of such vessels more nearly on the footing of stockholders in a corporation, in order that men of wealth might be encouraged to invest in ships. Congress was not, however, at this time dealing with fishing vessels, but with vessels engaged in foreign commerce. The merchant shipping is treated as a subject distinct from the fisheries in legislation, in decisions of the courts, and in text-books. U. S. Rev. Sts. Tit. 48–53. *Wait* v. *Gibbs*, 4 Pick. 298. *The Swallow*, 1 Ware, 21. *Taber* v. *United States*, 1 Story C. C. 1, 6, 7. *The Three Brothers*, 1 Gall. 142. Abbott on Shipping, 605, 606. Section 18 appears to have been intended to relate to the same common object with the rest of the statute, and does not extend the limitation of responsibility to owners of fishing vessels; and the common law liability of such owners remains.

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Since the decision of this case, the attention of the court has been called to the U. S. St. of June 19, 1886, *c.* 421, § 4, extending the provisions of the U. S. St. of 1884, *c.* 121, § 18, to all sea-going vessels. While this does not affect the liability of the defendant in the present case, it confirms the construction put by the court upon the St. of 1884, *c.* 121, § 18.

Exceptions overruled.

CLINTON P. VOSE *vs.* COUNTY OF ESSEX.

Essex. Nov. 5, 1887. — Jan. 5, 1888. DEVENS & KNOWLTON, JJ., absent.

The salary of an employee of a jail and house of correction was established by the county commissioners, under the Pub. Sts. *c.* 220, § 26, and increased by the Superior Court, under § 27. More than a year afterwards, the county commissioners reduced the salary. *Held*, that the salary fixed by the Superior Court did not continue until the further order of the court, and that the action of the county commissioners was legal.

CONTRACT to recover a balance of salary alleged to be due the plaintiff for services rendered, as steward and engineer, at the jail and house of correction at Lawrence, in the county of Essex. Trial in the Superior Court, without a jury, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows:

In 1879, the county commissioners fixed the salary of the then steward and engineer at the rate of $775 per annum. The sheriff of said county, who was master of the house of correction and keeper of the jail at Lawrence, deemed this salary inadequate, and he presented his petition to the Superior Court to fix the salary of said officer. Upon a hearing of this petition, after due notice thereof to the county commissioners, the court fixed said salary at $900 per annum,* which was thereafter paid to said steward and engineer, until he resigned his office.

On or about October 1, 1880, the sheriff of said county appointed the plaintiff steward and engineer of the jail and house

* The petition related to the salaries of several of the officers, and the order of the court, passed on June 24, 1879, was, "that the salaries of certain officers at the jail and house of correction at Lawrence shall be fixed as follows, viz.: steward and engineer, $900, ... from April first, 1879."

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of correction at said Lawrence; and the county commissioners, a short time after January 1, 1881, fixed his salary at the rate of $800 per annum. The plaintiff, however, contended that, under the order of the court before mentioned, he was entitled to a salary at the rate of $900 per annum; which claim was denied by the commissioners; they contending that they had a right to fix his salary at $800, and refused to allow him a larger rate. This sum of $800 per annum was paid to him so long as he remained in the service of the county as steward and engineer. No question was raised as to the plaintiff's salary prior to January 1, 1881, payment for the same prior to that time having been made to the satisfaction of both parties. No contention was made that the plaintiff waived his claim to the full amount of $900 per annum by accepting the amount of $800 as paid him.

The defendant put in the records of the county commissioners, showing that their board was organized annually, on or about January 1, of each year, and contended that the order of the court above referred to did not limit the right of the board of county commissioners of 1881, to fix the salary of the plaintiff; and that the said board and succeeding boards, notwithstanding said order, had the right to fix the salary of the plaintiff, as they did; and requested the judge so to rule; but the judge declined so to rule, and did rule, that so long as said order of court remained unchanged, and in the absence of any contract to the contrary, the plaintiff was entitled to receive the amount of salary fixed by the court; and that the county commissioners had not authority to fix the plaintiff's salary at a different sum. The judge found for the plaintiff for the full amount of his claim; and the defendant alleged exceptions.

C. G. Saunders, for the defendant.

E. T. Burley, for the plaintiff.

MORTON, C. J. Under our system of managing the prisons of the State, the sheriff has charge of the jails, and, except in the county of Suffolk, of the house of correction in his county, and is to keep them by himself or by his deputy or jailer or master. The jailer or master appoints all subordinate officers or assistants, but the responsibility of determining their compensation is placed upon the county commissioners. The statute

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provides that "the commissioners shall establish fixed salaries for all officers, assistants, and employees of jails and houses of correction, which shall be in full compensation for all their services." Pub. Sts. *c.* 220, § 26.

Section 27 provides that, "if the sheriff, master, keeper, or jailer deems any such salary inadequate, he may present his petition, showing the facts, to the Superior Court next to be holden for the county, and the court, after notice to the chairman of the county commissioners and a hearing, shall fix the salary, and pass such further order in the premises as law and justice require."

The provision that the commissioners shall establish the salaries implies that they shall have the power to change them from time to time, as the public interests seem to require. If the commissioners establish a salary, and the Superior Court, upon petition of the sheriff, increases it, we do not think that this takes away the power of the commissioners to establish a different salary in the future, if a change in the circumstances or the officer seems to require it. The order of the court fixing the salary is not for any definite period in the future. It is based upon the facts existing at the time it is passed. The statute contains no provision that the commissioners shall or may apply to the court for a reconsideration or revision of its order. It is not intended that the court shall exercise a continuing supervision over the officers or their salaries; that responsibility rests upon the county commissioners. This seems to be the purpose of the statute. If, therefore, after the Superior Court has fixed the salary of an officer or employee, the commissioners are of the opinion that a change in the circumstances and conditions has occurred which makes it just in the interest of the public that a different salary should be established, we are of opinion that they have the power to fix the salary at a lower sum, subject to the revision of the Superior Court upon the petition of the sheriff or jailer, if he is dissatisfied with the new salary as fixed.

In the case at bar, in 1879, the Superior Court, upon the petition of the sheriff, fixed the salary of the steward and engineer at the jail and house of correction in Lawrence at $900. The person who then held the office resigned, and in 1880 the

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plaintiff was appointed in his place, and the commissioners fixed his salary at $800. For the reasons stated above, we think they had the right to do this. It follows that, as the plaintiff has been paid his salary as fixed by the commissioners, he has no claim against the defendant. *Exceptions sustained.*

EDWARD P. SHAW *vs.* FREDERIC A. SILLOWAY.

Essex. Nov. 5, 1887. — Jan. 5, 1888. DEVENS & KNOWLTON, JJ., absent.

Where a debtor executes a collateral agreement to deliver, on demand, certain property as security for the payment of a debt, a demand made after the debt is barred by the statute of limitations is too late.

TORT. Writ dated March 8, 1886. The declaration contained two counts. The first count was for the conversion of one horse, one buggy, one wagon, one sleigh, and eleven pieces of furniture. The second count alleged that, on June 10, 1878, the defendant executed the following agreement: "I, Frederic A. Silloway, in consideration of the receipt of two hundred and twenty-four dollars on my note of this date, payable to Edward P. Shaw, or to his order, in four months from date, I herewith consign for sale to Edward P. Shaw the following merchandise, and as security for the payment of said note and all contracts due from me payable to the order of said E. P. Shaw, and the proceeds of all sales of merchandise herewith consigned, and to satisfy full payment of all contracts said Shaw may hold against me, payable to his order. Consignment." Then followed a list of the chattels set forth in the first count, and these words: "All stored in house and barn, 14 Fruit St., which I will deliver on demand of said E. P. Shaw. F. A. Silloway."

The second count further alleged that this agreement was given as security for the payment of a promissory note of even date with said agreement, and as security for the payment of all contracts due and payable from the defendant to the plaintiff; that these contracts were two promissory notes, signed by

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the defendant and payable to the plaintiff, each being dated October 12, 1878, for the sum of $89, payable four months after date; that the defendant owed the plaintiff a certain sum on these two notes; that the defendant had refused to deliver to the plaintiff the chattels set forth in said agreement, though requested so to do; and that he had within six years converted the same to his own use, and deprived the plaintiff of his security.

Trial in the Superior Court, without a jury, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff's evidence tended to show the following facts: On June 10, 1878, the defendant made and delivered to the plaintiff a promissory note, payable in four months to the plaintiff or his order, for $224, and executed and delivered to the plaintiff, at the same time, the instrument declared on. The chattels enumerated in said instrument were then in the defendant's possession, and continued in his possession up to the time of the trial. When the note of June 10, 1878, became due, the plaintiff paid a part of it, and gave for the balance the two notes, dated October 12, 1878, described in the declaration.

The defendant proved that the plaintiff brought an action against him in the Superior Court, wherein he declared upon said notes of October 12. The answer in said action was a general denial, and the statute of limitations. After hearing, a verdict and a judgment for the defendant were rendered. Neither party introduced any evidence showing upon what ground this verdict was rendered.

The plaintiff testified that in October, 1886, he made a demand upon the defendant for the goods enumerated in the instrument of June 10, 1878. This testimony was not contradicted or controlled. The plaintiff also testified that the said new notes had never been paid.

The defendant asked the judge to instruct the jury as follows: "1. There is no evidence of a conversion, and for that reason there must be a finding for the defendant on the first count. 2. The action cannot be maintained, on the evidence, on either count. 3. The statute of limitations is a bar to this action. 4. The evidence and the writ showing that no demand was made for the goods described in the writing dated July 10, 1878,

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until after more than six years from its date, and that no action was brought until after six years from its date, this action is barred. 5. The writing of July 10, 1878, does not secure the payment of the two notes of October 12, 1878."

The judge declined to give the rulings requested, except the first; and ruled that the action could be maintained. He also found, as a fact, that the demand in October, 1886, was within a reasonable time, and ruled that the statute of limitations was not a bar to the action. He accordingly found for the defendant on the first count, and for the plaintiff on the second count; and assessed damages in the sum of $158. The defendant alleged exceptions.

W. H. Moody, for the defendant.

A. Noyes, for the plaintiff.

C. ALLEN, J. The instrument upon which this action is brought is not clearly expressed, but its purpose and meaning seem to be reasonably plain. The defendant executed his promissory note for $224 to the plaintiff, and on the same day also executed and delivered to the plaintiff this instrument, reciting the receipt of $224 on his note, and consigning for sale to the plaintiff the personal property therein mentioned as security for the payment of the note and of all contracts due from him and payable to the plaintiff's order. The property in question consisted chiefly of a horse and vehicles; articles which would naturally be used by the person in possession of them. The instrument contained a promise to deliver this property to the plaintiff on demand. This shows that it was not necessarily to be delivered at once, and that it was contemplated that the defendant might remain in possession of it until a demand should be made. It must also have been understood that the defendant might himself sell part of the property, since the words "and the proceeds of all sales of merchandise herewith consigned" can only refer to sales by the defendant.

This instrument did not amount to a mortgage. There are no words in it which import a transfer of the legal title to the plaintiff; and there are no words of defeasance. It has been held that a bill of parcels, which contains no words of defeasance, and which is intended merely as security, if accompanied by delivery, is at most only a pledge, and is not a mortgage.

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Thompson v. *Dolliver*, 132 Mass. 103. *Walker* v. *Staples*, 5 Allen, 34. *Whitaker* v. *Sumner*, 20 Pick. 399. But the instrument now before us does not purport to convey the title; it is merely a consignment for sale. If possession of the property had accompanied the delivery of the instrument, the transaction would have been a pledge. The fact that possession was retained by the defendant did not have the effect to make the instrument a mortgage. The instrument, therefore, is merely a power of sale, with an agreement to deliver the property on demand, or the proceeds in case the property or any part of it should be sold by the defendant. Meanwhile he was to keep the possession until a demand by the plaintiff. It is an agreement to make a pledge as security for the demands referred to. This did not devest the defendant's title; it did not even create a lien. It would not authorize the plaintiff to take possession of the property, without the defendant's consent. It was a mere executory agreement. The property might have been sold by the defendant, or attached upon a writ against him. The contract might or might not be enforceable in equity, according to the circumstances. *City Ins. Co.* v. *Olmsted*, 33 Conn. 476. *Beeman* v. *Lawton*, 37 Maine, 543.

When the defendant's note fell due, it was partly paid in cash, and new notes were given to the plaintiff for the unpaid balance. These have never been paid. The finding of the court necessarily implies that these notes cannot be deemed to have been taken in payment of the original note, in such a sense as to destroy the security of the defendant's agreement. But the new notes, as well as the original note, are now barred by the statute of limitations, and an action brought upon them was defeated, as we must infer, on that ground. And this was the state of things at the time of the plaintiff's demand, under the agreement. The question, therefore, is, whether the action can be maintained upon the agreement, after the debts to be secured have become barred by the statute of limitations, and have been adjudged to be barred; or whether the agreement falls with the right to enforce the debt.

If there is an actual pledge, and the debt becomes barred, this does not give to the debtor a right to reclaim his pledged property. The debt is not extinguished; the statute only takes

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away the remedy. *Hancock* v. *Franklin Ins. Co.* 114 Mass. 155. In case of an ordinary mortgage of real or personal estate, the security is not lost, though the debt be barred. *Norton* v. *Palmer*, 142 Mass. 433. The rule is the same where there is a lien. *Spears* v. *Hartly*, 3 Esp. 81. *Higgins* v. *Scott*, 2 B. & Ad. 413. *In re Broomhead*, 16 L. J. (Q. B.) 355. In New York it has even been held, under the statutes of that State, that the lien of a judgment is not lost, although an action upon the judgment is barred. *Waltermire* v. *Westover*, 4 Kern. 16. And there appears to be no good reason why an independent collateral agreement given by way of guaranty or other security should not outlive the remedy upon the debt which it was given to secure, under proper circumstances.

It is however objected, in the present case, that the demand was made too late. The question has often arisen elsewhere, whether a court of law can properly lay down a general rule, that where a demand is necessary, as preliminary to the bringing of an action, such demand must be made within a reasonable time, and that, by analogy to the statute of limitations, six years should ordinarily be considered as a reasonable time. Such rule has been repudiated, or at least not acted upon, in the following cases: *Holmes* v. *Kerrison*, 2 Taunt. 323; *Thorpe* v. *Coombe*, 8 Dowl. & Ry. 347; *Rhind* v. *Hyndman*, 54 Md. 527; *Taylor* v. *Witman*, 3 Grant, (Penn.) 138; *Girard Bank* v. *Bank of Penn*, 39 Penn. St. 92. It has been adopted in the following cases: *Pittsburgh Railroad* v. *Byers*, 32 Penn. St. 22; *Morrison* v. *Mullin*, 34 Penn. St. 12; *Rhines* v. *Evans*, 66 Penn. St. 195; *Palmer* v. *Palmer*, 36 Mich. 487; *Atchison, Topeka, & Santa Fé Railroad* v. *Burlingame*, 36 Kans. 628. See also *Stanton* v. *Stanton*, 37 Vt. 411; *Thrall* v. *Mead*, 40 Vt. 540; *Keithler* v. *Foster*, 22 Ohio St. 27; *Jameson* v. *Jameson*, 72 Mo. 640; *Brown* v. *Rutherford*, 42 Law T. (N. S.) 659; *S. C.* on appeal, *nom. In re Rutherford*, 14 Ch. D. 687.

This question has not been determined in Massachusetts. *Codman* v. *Rogers*, 10 Pick. 112, was a case in equity, and the doctrine declared was merely the ordinary doctrine of laches in equity. See also *Western Union Telegraph Co.* v. *Caldwell*, 141 Mass. 489, 494. In *Emmons* v. *Hayward*, 6 Cush. 501, the agreement contained a stipulation that the demand should not be

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made until the plaintiffs, who were assignees under an assignment for the benefit of creditors, should make up their accounts, and they were prevented from doing this until the expiration of thirteen years from the date of the agreement, by reason of proceedings in equity instituted against them by the defendant. Under these circumstances, a demand having been made within about fourteen months after the termination of the suit in equity, it was held that the defendant could not be allowed to object that it was not made within a reasonable time. In *French* v. *Merrill*, 132 Mass. 525, it was held that an officer who held the avails of property sold under an attachment could not be allowed to object that a demand made upon him for the same, by the party entitled thereto, after the lapse of eleven years, was too late, as the funds were in the custody of the law, whose officer he was.

We have no occasion to determine the general question here, because we are of opinion that where, as in the present case, there is merely a separate collateral agreement to deliver, on demand, certain property as security for the payment of an existing debt, it is not a just or reasonable construction of such agreement to hold that a demand may be made upon it at any time, however remote, and although the debt to be secured has become barred by the statute of limitations. Otherwise, the claim might continue open forever. It is not to be supposed that such was the intention of the parties. It is true that no cause of action accrues until a demand, and that therefore the statute of limitations does not begin to run till such demand. But our decision rests on the ground that the contract, by implication, requires a demand within the time of the continuance of legal liability upon the debt, and that a demand after the expiration of that time is too late.

Exceptions sustained.

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JOHN P. WOODBURY *vs.* MARBLEHEAD WATER COMPANY.

Essex. Nov. 7, 1887. — Jan. 5, 1888. DEVENS & KNOWLTON, JJ., absent.

The St. of 1883, *c.* 163, incorporated a water company, for the purpose of furnishing the town of M., or any other town or city, with water. Power was given to take the water of a certain brook in M., to purchase other water sources, to take and hold lands for the purpose of conveying water into M., or other town or city, to lay down pipes over any lands, and to enter upon public or private ways under the direction of the authorities of the city or town where such ways are situated. The company was required, when land was taken, to record a description in the registry of deeds of the county in which the lands should be situated. Power was also given to make contracts with M., or with any other town or city, to supply water. It was also provided that the county commissioners for the county in which land taken was situated should require security for damages. The town of M. was given the right to purchase the franchise, and to tax the inhabitants therefor. *Held*, that the company had the right, under the statute, to acquire water rights outside of M. without acquiring any therein, and, for the purpose of conveying water to another town, to take land, although it conveyed no water to M.

The St. of 1883, *c.* 163, incorporating a water company, and giving it power to take lands, requires, in § 13, the county commissioners, upon the application of the owner of any land taken, to estimate the damages and require the corporation to give satisfactory security for the payment of all damages and costs which may be awarded such owner; and provides that the right of the corporation to enter upon or use such lands, except for making surveys, shall be suspended until it gives the security so required. *Held*, that the statute made adequate provision for compensation.

If a statute giving the right to a water company to take land by the right of eminent domain requires it to file a description of the land taken, "sufficiently accurate for identification," and land is taken in two towns, a description which states the land to be in one town, which does not state the width of the land taken, and which is vague as to the termini, is insufficient.

If a statute giving the right to a water company to take land by the right of eminent domain requires it to file a description of the land taken, "sufficiently accurate for identification," it is no objection to a description that it does not state the name of the owner of the land taken.

A water company, authorized to take land by the right of eminent domain on filing a description "sufficiently accurate for identification," filed a description and entered upon the land. The owner brought a bill in equity for an injunction against the company, and the company, after it had filed an answer in the case, filed a new description, and set this up in a supplemental answer. The first description was held to be insufficient, and the second to be sufficient. *Held*, that no injunction could issue, but that the bill might be retained for the assessment of damages in respect to the entry before the lawful taking.

HOLMES, J. This is a bill in equity to restrain the defendant from maintaining its pipes in the plaintiff's land, and from

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entering upon or using the same. The defendant justifies under the St. of 1883, *c.* 163. It has bought land in Swampscott, has sunk wells there, about three miles from the Marblehead boundary and has laid pipes from them in Lynn, in an opposite direction from Marblehead, through the plaintiff's land.

The plaintiff's first contention is, that the defendant is not authorized to purchase water sources outside the town of Marblehead, — arguing from the name given to the defendant, from the special power in § 2 to take the waters of Putnam's Brook in that town, preceding the general words used, from the power given to Marblehead to purchase the franchise, &c., from the unlimited extent of the powers conferred upon any other construction, and from the general scope of the act. We certainly are much impressed with the force of these considerations, but we cannot escape from the plain effect of the language used.

The first section creates a corporation "for the purpose of furnishing the inhabitants of the town of Marblehead, or any other town or city, with water." By § 2 the corporation may take "the water of Putnam's Brook, so called, in the town of Marblehead, and the water rights connected therewith, and may purchase other water sources," and may take and hold all lands and easements necessary for holding and preserving such water and for conveying the same into said town, "or other town or city," and may construct and lay down pipes, &c., under or over "any lands," &c., "or public or private ways, and along any such ways," &c., "and under the direction of the board of selectmen of the town, or the mayor and aldermen of the city in which any such ways are situated, may enter upon and dig up any such ways," &c. See also St. 1886, *c.* 343. In § 8 is the usual provision, that "within sixty days after the taking of any lands, rights of way, water rights, water sources, or easements as aforesaid, otherwise than by purchase," the corporation shall "file and cause to be recorded in the registry of deeds for the county within which such lands or other property is situated, a description thereof," &c. By § 5, the corporation may make contracts with Marblehead, "or any other town or city, ... or with any individual or corporation, to supply water," &c. Finally, by § 13, "The county commissioners for the county within which any land, water, or water rights taken under this act is situated,"

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shall require security for damages, upon application of the owner. It seems to us, that, if we should say that the defendant's right to take water is confined to the water in Marblehead, we should be yielding to our surprise at the scope of the powers conferred, rather than construing words according to their ordinary and plain meaning.

The plaintiff next objects that no adequate provision is made for compensation to the owner of lands taken otherwise than by purchase. But § 13,* to which we have referred, makes substantially the same provision that is made in respect of railroads by the Pub. Sts. *c.* 112, § 97, the sufficiency of which, we believe, never has been doubted. *Connecticut River Railroad* v. *County Commissioners*, 127 Mass. 50, 56. *Abbott* v. *New York & New England Railroad*, *ante*, 450. And although the injunction provided for by § 104 is not mentioned, doubtless one would be granted if the defendant undertook to use the land contrary to the terms of the act. *Brickett* v. *Haverhill Aqueduct Co.* 142 Mass. 394, 397.

We agree with the plaintiff, that the first description filed was not "sufficiently accurate for identification," as required by § 8. *Wilson* v. *Lynn*, 119 Mass. 174. *Warren* v. *Spencer Water Co.* 143 Mass. 9. The vote to take "the following described lot of land in Lynn,"† which the written description

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* This section is as follows: "The county commissioners for the county within which any land, water, or water rights taken under this act is situated, shall, upon application of the owner thereof, require said corporation to give satisfactory security for the payment of all damages and costs which may be awarded such owner for the land or other property so taken; but previous to requiring such security the county commissioners shall, if application therefor is made by either party, make an estimate of the damages which may result from such taking, and the county commissioners shall in like manner require further security, if at any time the security before required appears to them to have become insufficient; and all the right or authority of said corporation to enter upon or use such land or other property, except for making surveys, shall be suspended until it gives the security so required."

† The description, after these words, was as follows: "Commencing at the southerly line of Nahant Street, in the city of Lynn, at a point approximating the crest of the Lynn Beach; thence in a southwesterly direction on the said crest of said beach, through lands supposed to belong to J. P. Woodbury and Edward Heffernan, to Beach Street in said Lynn."

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incorporates, and to which the plan subsequently filed within the sixty days refers, does not set out the width of the lot, and is vague as to the termini. A part of the plaintiff's land, too, is in Nahant. The written description is equally vague. The plan, if sought to be used either in aid of the instrument or as an independent description, apart from other objections, only cures the latter defect of the vote, if it can be cured.

But since the bringing of the bill there has been a new vote, a new entry, and a new description filed, accurate in itself and referring to an accurate plan. The only fault found with this description is that it does not set forth the names of the owners. But it identifies the land, which is all that the statute or justice to the owners requires. See *Grand Junction Railroad & Depot Co.* v. *County Commissioners*, 14 Gray, 553, 564. It was not argued for the plaintiff that the power to take could not be exercised from time to time, or that it was exhausted as to this particular land by an ineffectual attempt to exercise it. See *Sudbury Meadows* v. *Middlesex Canal*, 23 Pick. 36, 52; *Stamps* v. *Birmingham & Stour Railway*, 2 Phillips, 673.

It follows that no injunction can be granted. But whether or not the plaintiff would have obtained an injunction on the merits of his case as it stood at the time when the bill was filed, he must be taken to have had a case within the equitable jurisdiction of the court, in the absence of a demurrer, and for damages as an incident of the cause, until after the original pleadings were complete. *Creely* v. *Bay State Brick Co.* 103 Mass. 514. *Winslow* v. *Nayson*, 113 Mass. 411. The bill therefor may be retained for the assessment of damages, if any, in respect of the entry before the lawful taking, if it be desired. See further *Milkman* v. *Ordway*, 106 Mass. 232.

Ordered accordingly.

G. O. Shattuck & J. Woodbury, for the plaintiff.

J. P. Farley & J. F. Wheeler, for the defendant.

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CLARA E. FOGG *vs.* EBEN N. PRICE & others.

Essex. Nov. 7, 1887. — Jan. 5, 1888. DEVENS & KNOWLTON, JJ., absent.

If the defendant in a suit in equity files a demurrer to the bill, and also an answer, the court may, under Rule 22 in Chancery, allow the answer to be withdrawn, and may hear the case on the bill and demurrer; and it is not necessary that the demurrer should be again filed.

If a lease of land contains a provision that, "if the premises are for sale at any time, the lessee shall have the refusal of them," and the lessor conveys them to a third person, the lessee cannot maintain a bill in equity, against the lessor and the purchaser, for specific performance of the provision.

BILL IN EQUITY, filed April 21, 1886, against Eben N. Price, Charles H. Price, and Joseph Price, alleging the following facts:

On April 9, 1867, Eben N. Price, the owner of a parcel of land in Salem, with the buildings thereon, executed a lease of the same, for the term of twenty years from said April 9, to Julian A. Fogg, his executors and administrators. The lease contained this provision: "It is further provided, that, if the premises are for sale at any time, the lessee shall have the refusal of them."

On July 29, 1875, Julian A. Fogg, by an instrument under seal, assigned the lease, the premises thereby demised, and all his right, title, and interest in or under the same, to Edward A. Hodgkins.

On September 21, 1875, Eben N. Price, by a deed of quitclaim, released all his right, title, and interest in and to the premises to Charles H. Price and Joseph Price. This conveyance, the bill alleged, was made with intent to defraud Hodgkins, and without notifying the lessee or Hodgkins that the premises were for sale, the grantees having full knowledge of the provisions of the lease, and Hodgkins having always held himself in readiness to purchase the estate.

On March 5, 1886, Hodgkins assigned to the plaintiff the lease, the premises therein described, and all his right, title, and interest in or under the same. The prayer of the bill was that the deed from Eben N. Price be declared void; that a specific performance of the contract contained in the lease be enforced;

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that the defendants be ordered to convey the premises to the plaintiff on the same terms as were at the sale enjoyed by said Charles and Joseph; that the defendants be restrained by injunction from collecting from the plaintiff the rents of the estate; and that a receiver be appointed.

On July 27, 1886, the defendants filed a demurrer to the bill, assigning, as grounds thereof, that the bill stated no case for relief in equity; that the plaintiff had no interest in the subject matter; that the bill was multifarious; and that the cause of action, if any, did not accrue within six years.

On July 27, 1886, the defendants filed an answer to the bill; and on December 6, 1886, the plaintiff filled an exception to the answer.

At the hearing, before *C. Allen*, J., when the case was opened, and before argument on the demurrer, the plaintiff asked the judge to rule as follows: "The defendants, having demurred to the whole bill and answered the whole bill, have thereby overruled their own demurrer."

The judge intimated to the defendants' counsel that the answer might be withdrawn. The defendants thereupon made a motion to be allowed to withdraw their answer. The plaintiff asked the judge to rule that the answer could not be withdrawn without the consent of the plaintiff. The judge declined so to rule, and the answer of the defendants was allowed to be withdrawn. The judge then entertained the demurrer, and, upon a hearing, ordered it to be sustained on the ground of laches.

The plaintiff appealed from the order sustaining the demurrer, and alleged exceptions to the rulings of the judge as above set forth.

J. A. Fogg, for the plaintiff.

G. B. Ives, for the defendants.

HOLMES, J. It was formerly a rule that you could not demur and answer to the same matter, and as the demurrer was a reason for not answering, the subsequent filing of an answer overruled the demurrer. Now that a demurrer may be inserted in an answer (Rule 13), there seems to be no longer any reason why a separate demurrer should be overruled by an answer filed subsequently. But whether the answer had such an effect or not, the court had power to allow it to be withdrawn (Rule 22),

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and when it was withdrawn, then, so far as the present question is concerned, it was as if it never had been filed. To say that the demurrer was dead, is only a misleading figure of speech. It was a part of the record, which may have been inoperative so long as another part of the record showed that it had no function to perform because the defendant had done what the demurrer said he ought not to be required to do. But when the record ceased to show that state of things, it was not necessary for the defendant to go through the empty form of requesting the clerk to note a second filing of the paper. If it were, it would not help the plaintiff, as we should permit it to be done now, because we are of opinion that the bill does not state a case for equitable relief, and that the covenant set out is not of a nature to be specifically enforced.

The covenant is, "if the premises are for sale at any time, the lessee shall have the refusal of them." This is simply an agreement to give the lessee the first chance to make a contract, — an agreement to sell if the parties can agree, but not otherwise. It neither fixes the price nor provides any way in which it can be fixed. Suppose that the premises had been advertised for sale, and that the tenant had brought his bill at once, it is plain that the court could not have named any sum at which the lessor should be compelled to sell. Considered therefore in the light of a contract to sell, as it is treated by the bill, it does not satisfy the statute of frauds, and, apart from the statute, it is not such a contract as equity can specifically enforce. *Pray* v. *Clark*, 113 Mass. 283. *Grace* v. *Denison*, 114 Mass. 16. *Gelston* v. *Sigmund*, 27 Md. 334. *Abeel* v. *Radcliff*, 13 Johns. 297. *Bromley* v. *Jefferies*, 2 Vern. 415.

It may be said that the contract does mean that the lessor will deal with the lessee on the same terms as with any one else, or at least will not discriminate against him; that the lessor has now fixed his price by a sale; and that, as the purchaser had notice of the contract, the defendants have removed the difficulties in the way of specific performance by their own conduct. It might be that the remedy would do substantial justice as against the lessor, but, in order to do it, a term would have to be added which is not in the contract. The contract certainly does not contemplate a sale to somebody else as a mode of

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ascertaining the price at which the lessor will sell to the lessee. *Bromley* v. *Jefferies*, *ubi supra*. The statute of frauds remains unsatisfied notwithstanding what has happened. It is not the event, but the nature of the contract, which is to be considered, and that must be determined by looking at it as it stood at the time it was made. See *Stapilton* v. *Stapilton*, 1 Atk. 2, 10; *Walton* v. *Coulson*, 1 McLean, 120, 129; *Moore* v. *Fitz Randolph*, 6 Leigh, 175, 186.

In deciding the case upon this ground, we do not mean to intimate that the bill does not disclose laches. See *Milward* v. *Thanet*, 5 Ves. 720, n.; *Eads* v. *Williams*, 4 DeG. M. & G. 674, 691; *Brooke* v. *Garrod*, 3 K. & J. 608; *Ranelagh* v. *Melton*, 2 Dr. & Sm. 278; *Weston* v. *Collins*, 13 W. R. 510; Fry Sp. Perf. §§ 1072, 1073. Neither do we mean to say that this defence is not open upon demurrer. There is no doubt that the statute of limitations can be taken advantage of in this way, because, although at common law the statute would have to be pleaded, and matter of avoidance could not be alleged before the replication, (2 Wms. Saund. 63, n. 6; *Sawyer* v. *Boston*, 144 Mass. 470, 472,) in equity such replication as the plaintiff desires to make, other than the formal joinder of issue, must be inserted in the bill, and therefore, if the lapse of time is shown and not met, a demurrer lies. It has been thought that a different rule applies to laches, on the ground that it is a conclusion of fact which cannot be drawn on demurrer. Mitf. Eq. Pl. (4th ed.) 212. But the Massachusetts decisions hold that a demurrer will lie in clear cases. *Plymouth* v. *Russell Mills*, 7 Allen, 438. *Williams* v. *Hart*, 116 Mass. 513.

We have assumed in favor of the plaintiff, without deciding, that although the covenant sought to be enforced was broken before the assignment to the plaintiff, and the right of action was therefore attached to the person of her assignor, (*Clark* v. *Swift*, 3 Met. 390, 392,) the chose in action might be assigned in equity, (3 Met. 395,) at least for purposes of specific performance, and that the assignee might sue in her own name without joining her assignor, as properly as if the contract had not been broken. *Bill dismissed.*

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WILLIAM R. STOCKBRIDGE & others, petitioners.

Hampden. Sept. 27, 1887. — Jan. 6, 1888. W. ALLEN, J., absent.

A man left his wife and family in August, 1871, to seek work. His wife heard from him only twice after he left, the last time being about three weeks after so leaving, and she never heard of him again, though she made inquiries. At the time he left, his health was "fair," although he was then "drinking hard," and had been for some years. *Held*, that these facts were sufficient to raise a presumption of fact that he died before June 21, 1881.

Under the Gen. Sts. *c.* 92, § 28, (Pub. Sts. *c.* 127, § 23,) if a bequest is made to one of a class, who is a relation of the testator, and the legatee dies before the testator, leaving issue surviving the testator, such issue are entitled to the legacy.

If, under the St. of 1885, *c.* 376, the judge of probate directs the amount of a legacy to be deposited in a savings bank, on the representation of the executors that the residence of the legatee is unknown, and it afterwards appears that the legatee died before the testator, and that his issue are entitled to it, under the Pub. Sts. *c.* 127, § 23, the judge of probate should order the amount to be paid to such issue.

PETITION to the judge of probate, by the three children of David H. Stockbridge, one of said children being a minor, alleging that said David H. was named as a legatee under the will of Elam Stockbridge, whose will had been duly proved and allowed; that David H. died before said Elam; that the legacy, amounting to $1521.60, had, by a decree of the Probate Court, been ordered to be deposited in the Springfield Institution for Savings; and that the petitioners were entitled to the same.

The judge of probate dismissed the petition; and the petitioners appealed to this court.

The case was heard before *W. Allen*, J., who reported the case for the consideration of the full court, in substance as follows:

Elam Stockbridge died on June 21, 1881. His will was dated December 19, 1873, and the last of several codicils, each of which expressly ratified and confirmed the will, except so far as changed by the codicils, was dated June 19, 1879. These instruments were duly admitted to probate. By the third clause of his will, he directed his executors to divide all the remainder of his estate into nine parts. One of these nine parts he directed to be divided into five parts, and one of these five parts he directed his executors "to divide equally among the children

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of Chester Stockbridge." In another part of the will, the testator described Chester Stockbridge as "son of my brother David."

The estate of Elam Stockbridge has been settled by the executors, and the residuary legacies have become payable.

The executors of the will of Elam Stockbridge filed a petition in the Probate Court, on which no notice was ordered, representing that a certain sum was due David H. Stockbridge as a legatee under said will, and that his place of residence was unknown; and praying that the sum might be ordered to be deposited or invested, according to the provisions of the St. of 1885, *c.* 376. On March 17, 1886, the judge of probate passed an order, which, after reciting the petition, proceeded as follows: "It appearing that the residence of said David H. Stockbridge is unknown, said executors are hereby ordered to deposit said sum in the Springfield Institution for Savings, in the name of the judge of said court, for the time being, to accumulate for the benefit of said legatee, and said executors are further ordered to file in said court a memorandum of such deposit, with the original certificates or other evidence of title thereto." The executors deposited the money accordingly.

David H. Stockbridge is the son of said Chester Stockbridge; the petitioners are the only children of said David H., and were his only issue living at the decease of the testator. Neither said David H. nor the petitioners are named in the will, or take anything under it, unless under a legacy to children of Chester Stockbridge.

The petitioners, to prove that David H. Stockbridge died before the testator, offered the deposition of the wife of said David H., in which she testified that she and David H. were married on September 10, 1857; that she last saw him on August 17, 1871, at Princeton, Illinois; that at that time they were living together as man and wife; that they then had three children, William R., twelve years old, Hattie L., eleven years old, and Mary G., one year old; that the family had no means of support other than those provided by said David; that David was out of work and could get none; that he was offered work on the construction of a new railroad in Michigan, and accepted it; that the railroad was to run from Houghton, Michigan, to

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Chicago; that he and others left to go to Michigan and work on that job; that he said he should go to Houghton; that after he left his home she received two letters from him, the first dated at Chicago, Illinois, and the last at Milwaukee, Wisconsin; that the first was received about two days after he left, and the last about three weeks after he left; that she had not heard from him since that last letter; that he was forty-one years old on August 28, 1871, the month he left home; that she had written to him at Houghton, Michigan, and also to the postmaster at that place; that his brother, Frank W., had made all the effort he could to find his whereabouts; that she had inquired of persons who left with him; and that the condition of his health when he left home was fair; but he was drinking very hard, and had been for some years before he left home.

C. L. Long, for the petitioners.

C. ALLEN, J. Assuming that the statements contained in the deposition were true, they are sufficient, in the absence of anything to the contrary, to raise a presumption of fact that David H. Stockbridge died before the testator. The rule is carefully stated in *Loring* v. *Steineman*, 1 Met. 204, 211, by Chief Justice Shaw: "Upon a person's leaving his usual home and place of residence for temporary purposes of business or pleasure, and not being heard of, or known to be living, for the term of seven years, the presumption of life then ceases, and that of his death arises. But this presumption may be rebutted by counter evidence, or by a conflicting presumption." And in *Prudential Assur. Co.* v. *Edmonds*, 2 App. Cas. 487, 509, it was stated by Lord Blackburn to be "necessary, in order to raise the presumption, that there should have been an inquiry and search made for the man among those who, if he was alive, would be likely to hear of him." See also *Flynn* v. *Coffee*, 12 Allen, 133; *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87, 96; *Bowditch* v. *Jordan*, 131 Mass. 321; *In re Phené's trusts*, L. R. 5 Ch. 139; *In re Lewes' trusts*, L. R. 6 Ch. 356; 1 Greenl. Ev. § 41; 1 Taylor Ev. § 200. It should therefore now be taken for granted that David H. Stockbridge died before the testator; and by virtue of the Gen. Sts. *c.* 92, § 28, reënacted in the Pub. Sts. *c.* 127, § 23, his issue who survived the testator are entitled to take what he would have taken had he survived the testator.

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The circumstance that the gift to him was only as one of a class does not prevent the operation of this statute. *Moore* v. *Weaver*, 16 Gray, 305. The fact that David H. Stockbridge was a nephew of the testator is found in the will. It does not appear, nor in the view which we have taken is it material, whether any children of Chester Stockbridge survived the testator; that fact, if it existed, would not cut off the right of the children of David H. Stockbridge; it would only diminish the amount to which they would be entitled.

The executors of the will of Elam Stockbridge deposited the money in the Springfield Institution for Savings, by virtue of an order of the judge of probate, passed in pursuance of the St. of 1885, *c.* 376, it being recited that it appeared to him that the residence of David H. Stockbridge was unknown. This, however, was not intended to have any further effect than to provide for the proper keeping of the money, with its accumulations, until it should be ascertained and determined who are properly entitled to receive the same. It now appears that the petitioners are so entitled; and an order may be framed for the payment of two thirds of the amount to the two petitioners who are *sui juris*, and of one third to the guardian of Mary G. Stockbridge, a minor, when such guardian shall be duly appointed.

Decree accordingly.

JOSIAH A. BRIGHAM & another, executors, *vs.* LOUIS J. ELWELL.

Worcester. Oct. 4, 1887. — Jan. 6, 1888. C. ALLEN & KNOWLTON, JJ., absent.

If a sole devisee of a farm is appointed one of the executors of the will of his devisor, the executors, with the assent of the devisee, may occupy the farm for the benefit of the estate, and, while it is so occupied, the products of the farm cannot be taken on attachment as the property of the devisee.

TORT, by the executors of the will of Azubah Brigham, for the conversion of a quantity of hay and thirty-three casks of cider. The defendant, a deputy sheriff, justified by virtue of a

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writ in an action against Josiah A. Brigham individually, on which he attached, on January 5, 1885, the hay and cider as the property of said Brigham.

At the trial in the Superior Court, before *Staples*, J., it appeared that Josiah A. Brigham was the sole devisee of a farm owned by the testatrix at the time of her death. The plaintiffs contended that the hay and cider were the products of the farm, while it was being carried on by them as executors, and that they were assets of the estate.

Josiah A. Brigham, who was the only witness called, testified, in substance, as follows: Azubah Brigham, my mother, died on December 6, 1883. I lived on the farm with her. William Curtis and I were appointed executors on January 15, 1884. After we were appointed, we carried on the farm as it had been carried on, took care of the stock, and did what was necessary to be done. In the spring of 1884, we sold a part of the stock; then we went on, having a lot of young stock. We cut the hay and kept the young stock. The young stock grew, and in April, 1885, we sold all the stock. After that we did not carry on the farm. When we took possession we had a talk about carrying on the farm. This was in January or February, 1884. We thought we would sell the stock off by auction in the winter. We waited until March, when we thought it would be better to keep the young stock, and cut the hay, for the benefit of the estate. We kept an account of all this as executors, and have rendered an account. The hay in question was cut on the farm in July, 1884, and the cider was made from apples that came from the farm the same year. I made the contracts for cutting the hay and picking the apples. Curtis lived two miles from the farm. He paid the bill for cutting the hay.

At the close of the evidence the defendant asked the judge to rule as follows: "1. There is no evidence to go to the jury which will warrant them in finding that the property in question belonged to the plaintiffs; and the plaintiffs, upon all the evidence, cannot recover. 2. The parties who are alleged to have made the arrangement were not competent to make such an arrangement or agreement as would make the products of the farm in 1884 the property of the executors, the said Josiah A. being a necessary party on each side of the same."

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The judge declined so to rule, and submitted to the jury the following question: "On or about January 1, 1884, was it arranged and agreed by and between the executors and Josiah A. Brigham, as sole devisee of the farm, that the executors should use, occupy, and carry on the farm, and that the executors during such use and occupation should take the entire proceeds of the farm, including the hay and cider in suit, and that the same should belong to the estate and be accounted for as assets thereof, and did the executors use, occupy, and carry on the same under such agreement and arrangement?" The jury answered this question in the affirmative, and also answered questions as to the value of the property. The jury were thereupon directed to return a verdict for the plaintiffs for the amount so found, with interest. The defendant alleged exceptions.

T. G. Kent, for the defendant.

F. P. Goulding, for the plaintiffs.

W. ALLEN, J. The jury found that the hay and cider were produced by the plaintiffs from the farm while they carried it on as executors, under an arrangement with the devisee that they should carry it on and take the proceeds and account for them as assets. Income of the real estate of a testator so received by his executor is assets of his estate. Pub. Sts. *c.* 144, § 5. *Stearns* v. *Stearns*, 1 Pick. 157. *Palmer* v. *Palmer*, 13 Gray, 326. *Choate* v. *Arrington*, 116 Mass. 552. *Choate* v. *Jacobs*, 136 Mass. 297. *Edwards* v. *Ela*, 5 Allen, 87. *Brooks* v. *Jackson*, 125 Mass. 307. *Adams* v. *Palmer*, 6 Gray, 338. *Newcomb* v. *Stebbins*, 9 Met. 540. *Almy* v. *Crapo*, 100 Mass. 218. *Towle* v. *Swasey*, 106 Mass. 100. The direct question is, whether the property in the hay and cider was in the plaintiffs as executors, and that involves two questions: whether the fact that one of the executors was also the sole devisee of the land prevented the executors from occupying it for the benefit of the estate, with the assent of the devisee, so as to be chargeable with the income; and whether, if they did so occupy the farm, its produce, while it was carried on by the executors, belonged to them in their representative, and not in their personal capacity.

1. The presumption that a devisee of land who enters upon it enters under his title as devisee may be overthrown. He may

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enter under another title, and occupy in another character than that of devisee. If he is also sole executor, it would seem that he would have the power to occupy as executor, for the benefit of the estate. What would constitute or prove such an occupancy, so as to make the rents and profits assets, is a very different question from that of the power so to occupy. In *Newcomb* v. *Stebbins*, *ubi supra*, it was held that taking notes for rent to himself as executor did not of itself make them assets, and estop him to show in what capacity he occupied; but it would seem that charging himself with the rents and profits in his account would show that he received and held them as assets. The fact that the sole executor and devisee occupied as executor, and not as devisee, may be difficult of proof, but it is not impossible. But when the devisee is also one of two executors there is no difficulty. Whether the two occupied the real estate and took the rents and profits, is a question of fact easily susceptible of proof. Whether the devisee assented to their occupancy as executors, for the benefit of their estate, is also a question of fact. The fact that he is the devisee of the land does not take from him his capacity to assent to the occupancy by the executors, or to occupy with his co-executor. There is no question of contract, or of estate in the land. The rents and profits come from the actual occupancy by the executors, and the assent to such occupancy by the devisee prevents him from claiming them, and leaves them assets of the estate. The jury have found that the executors carried on the farm for the purpose of taking the proceeds and accounting for them as assets. The assent of the devisee is not left to be implied from the fact that he was one of the executors who so occupied, but it is found that it was expressly given; the executors are therefore bound to account for the income as assets.

2. As Brigham and Curtis carried on the farm jointly, the products in question — hay and cider made by them from the produce of the farm — belonged to both of them, and not to either one alone. To maintain this action they must show that it belonged to the estate of their testator, that is, that it belonged to them in their representative, and not in their personal capacity. The statute is, "If the real estate has been used or occupied by an executor or administrator, he shall account for

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the income thereof as ordered by the Probate Court." Pub. Sts. c. 144, § 5. The St. of 1789, c. 11, § 2, read as follows: "When a dispute shall arise respecting the occupation, use, and improvement of real estate in the hands of the executor or administrator, and the quantum he ought to credit in his account therefor," &c. An executor can account for the income of real estate which he has occupied by charging himself with a proper sum as rents and profits, or by charging himself with the net receipts and products from it, and the statute includes either mode of accounting. An executor may himself use the real estate, living in the house or carrying on the farm for his own use, as if a tenant, in which case he would account for the income by charging himself with the use and occupation; or he may occupy it as a bailiff, collecting rents from tenants, or carrying on the farm for the estate, in which case he would account for the income by charging himself with the rents and products received. In the former case, the produce of the farm would belong to him personally; in the latter, it would belong to him as executor. Whether a particular occupancy is of the one character or the other is an inference from the particular facts affecting it. In this case it is found as a fact, that the farm was carried on for the estate of the testator, and with the intent and purpose that the proceeds should belong to the estate. The evidence shows that the particular reason for doing this was to benefit the personal property of the estate, to increase the value of the stock upon the farm by keeping it upon the produce of the farm, for a better market. It is inconsistent with this to regard the produce of the farm as belonging to the executors personally, to be removed from the farm by them or their creditors at pleasure. The conversion by the defendant was in the month of January; the property converted was products of the farm remaining upon it, which had been produced and were held by the plaintiffs as executors. If on that day they had vacated their office, and an administrator had been appointed in their place, we cannot doubt that the property in such products of the farm, as well as in the stock upon it held by them as executors, would have passed to the administrator. They had then rendered no account. It does not appear when or in what form their account was afterwards rendered; but it is to be presumed that their

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account when rendered would conform to the facts, like the accounts in *Edwards* v. *Ela*, *ubi supra*, and would charge them with the specific property as assets of the estate. It does not appear that they have not already done so.

Upon the facts found by the jury, and assumed to be true, the inference of law is, that the property converted belonged to the plaintiffs as executors. *Exceptions overruled.*

TIMOTHY SHEA *vs.* INHABITANTS OF MILFORD & another.

Worcester. Oct. 5, 1887. — Jan. 6, 1888. C. ALLEN & KNOWLTON, JJ., absent.

B. made a contract with A., an owner of land, to build a house for A. on the land. Before the house was finished, A. requested B. to remove certain chattels, then on the land and used by B. in building the house, to another part of the land. B. unreasonably neglected to do so, and A. removed them to another part of the land, doing no unnecessary damage to them. *Held*, that even if B. had an unrevoked license to have the chattels on the land, he could not maintain an action against A. for their conversion.

TORT for the conversion of certain personal property. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, in substance as follows:

Evidence was introduced tending to show that the town of Milford, one of the defendants, contracted with the firm of Mead, Mason, and Company for the construction of a granite stone building for a Memorial Hall in Milford; that Mead, Mason, and Company sublet the stone-work to the plaintiff; that the defendant Swasey was the agent and architect for the town, and as such had the supervision of the building for said town under a contract with Mead, Mason, and Company; that the time for building said hall by the contract with Mead, Mason, and Company was from the making of the contract, in March, 1884, until April 1, 1885; that the contract with the plaintiff was until August 15, 1884; that the plaintiff did not complete his part of the work by August 15, but was requested by the contractors

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and the town's agent, Swasey, to perform work included in the contract after said time had expired; and that Swasey requested the plaintiff to perform certain work upon the walls of said building after the alleged conversion of said property, which alleged conversion took place by the direction of Swasey, acting for the town, in April, 1885.

The property alleged to have been converted was the plaintiff's sheds, engine-house and engine, plank, staging, lime, cement, and other like personal property used by the plaintiff in the construction of said building, and which the plaintiff had placed upon the property of the defendant town under the license implied or conferred, as he alleged, in the contract for building said hall. The property alleged to have been converted was removed from where the plaintiff had used it during the erection of said building, and where he claimed the right to use it in the completion of the building, which he had contracted to do, and which the defendants had requested him to perform, to another part of the lot of the town; and there was evidence tending to show that it was necessary for him to use the tools, implements, and other personal property in the completion of said contract.

The plaintiff asked the judge to rule, that so long as the plaintiff had the right of possession of the premises, either under the contract of the town with the general contractors, or with the plaintiff as sub-contractor, the defendants had no right to interfere with the plaintiff's reasonable use of the premises for his tools, implements, and machinery necessary to the proper performance of his work under said contract of the town.

The judge refused to rule as requested, but instructed the jury as follows: "The plaintiff, upon the evidence, had only an implied license to keep his engine and other property upon the property of the town, which might be at any time revoked altogether, or as to any particular portion of the lot. If the town, for any cause, required of the plaintiff the removal of that property from the lot, or from any particular part of the lot, and the plaintiff unreasonably neglected so to remove it, and thereupon the defendants removed it to another part of the lot, doing no unnecessary damage to the property, the plaintiff cannot recover."

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The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

W. A. Gile, for the plaintiff.

T. G. Kent & G. T. Dewey, for the defendants.

W. ALLEN, J. The property of the plaintiff alleged to have been converted by the defendants was on land belonging to and occupied by the defendant town. The town requested the plaintiff to remove the property to another place on the same parcel of land, and the plaintiff refused to do so, whereupon the defendants removed it to the place assigned by the town. The instruction, that, if the plaintiff unreasonably neglected to remove the property, and the defendants removed it to another part of the lot, doing no unnecessary damage, the plaintiff could not recover, was sufficiently favorable to the plaintiff, even if he occupied under a license which had not been revoked. The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it, and that all that was claimed by the defendants was the right to remove the goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property converted to their own use. *Farnsworth* v. *Lowery*, 134 Mass. 512. *Foulder* v. *Willoughby*, 8 M. & W. 540. *Heald* v. *Carey*, 11 C. B. 977.

It is immaterial whether the plaintiff had an unrevoked license to occupy the land, and we express no opinion upon that question. *Exceptions overruled.*

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TIMOTHY SHEA *vs.* INHABITANTS OF MILFORD.

Worcester. Oct. 6, 1887. — Jan. 6, 1888. C. ALLEN & KNOWLTON, JJ., absent.

A committee chosen by a town to erect a building is not a board of public officers, but acts as agent of the town, and it is not obliged to act as a body, but may act by the agreement of the individual members separately obtained.

The St. of 1883, *c.* 119, authorizing a town to build a Memorial Hall, and, for that purpose, to borrow a sum not exceeding $20,000, does not prohibit the town from voting to expend a larger sum upon the building.

A committee, appointed by a town to consider location, plans, and estimates, and to make recommendations for a building to be built by the town, recommended a certain location, and the plans and specifications of a certain architect, and reported that the price should not exceed $20,000. This report was accepted by the town and placed on file, and the committee was instructed to receive proposals for a building. Subsequently, the town voted that the report and plans of the committee be adopted, and that the same committee build the building. The town also voted to raise by taxation for the purpose the sum of $2000, and to borrow the sum of $20,000. The specifications reported by the committee were for the entire completion of the building, and stated that no charge should be made for extra work, except it be ordered in writing by the architect. *Held*, that the plan and specifications were adopted by the town as a limitation upon the powers of the committee. *Held, also*, that the committee had authority to change the specifications in order to remedy defects in them, and to improve them in minor details, within reasonable limits. *Held, also*, that the vote of the town did not prohibit the committee from incurring liabilities for extra work beyond the amount of the appropriation.

CONTRACT, on an account annexed, to recover for work done and material furnished in the erection of a Memorial Hall in the town of Milford. At the trial in the Superior Court, *Bacon*, J., directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

W. S. B. Hopkins & W. A. Gile, for the plaintiff.

T. G. Kent, for the defendant.

W. ALLEN, J. The committee was an agent of the town, and not a judicial body or a board of public officers, and the ruling of the court that the committee could act only as a body, and not by the agreement of individual members separately obtained, cannot be sustained. *Haven* v. *Lowell*, 5 Met. 35.

The defendant contends that the further ruling, that there was no evidence sufficient to show agency on the part of Swasey, or action by the committee, was right, for the reasons that the

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committee had no authority to make the contract under which the plaintiff claims, or authorize it to be made, and that the evidence was not sufficient to prove that contract.

The committee was appointed by the defendant town to build a Memorial Hall. Mead, Mason, and Company contracted with the committee to erect the building according to certain specifications. The plaintiff contracted with Mead, Mason, and Company to do all the stone-work according to the specifications. The plaintiff's bill of particulars contains five items for materials and labor which he contends were not included in his contract with Mead, Mason, and Company, but were furnished under a contract or contracts between him and the defendant, through the committee and Swasey, the supervising architect. The largest of these items, and the only one in reference to which any evidence was given, is $2500, for brown-stone trimmings for the building. It is not disputed that these trimmings were put in by the plaintiff, and that they were not included in the specifications. The first question is as to the authority of the committee to contract for work outside of the contract with Mead, Mason, and Company.

The Memorial Hall was built under authority of the St. of 1883, *c.* 119, which authorized the town to borrow for the purpose a sum not exceeding $20,000, but put no limit upon the amount the town might expend.

In November, 1883, a committee, which had been appointed in the April preceding to consider location, plans, and estimates, and to make recommendations, reported, to quote the words of the exceptions, "recommending the location on which the hall was afterwards built, and the plan and specifications of Frederick Swasey, architect, and reported that the price should not exceed $20,000." We would say here, that we do not understand by this that the committee recommended that the town should vote that the cost of the building should not exceed $20,000, but that they expressed the opinion that it would not, meaning the same as if they had said "ought not" or "would not." In the absence of the language of the report, and upon the mere statement of its substance, the plaintiff ought not to be bound by a meaning that is not clear, and the fact that this is not among the things recommended in the

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report, and the action of the town at the same and at a subsequent meeting, indicate that the committee intended and was understood to express its opinion that it could be built for that sum. The report was accepted and placed on file, and the committee instructed to receive proposals for a building.

At a town meeting in March, 1884, the following votes were passed: "Voted, that the report and plans of the Memorial Hall committee be adopted. Amended: also location adopted. Also that the same committee locate and build the same. Voted, that, for the purpose of building a Memorial Hall, we raise by taxation the sum of $2000, and the town borrow the sum of $20,000, payable in equal instalments of $5000, in one, two, three, and four years."

The specifications reported by the committee in November, 1883, so far as material, were as follows: "Specifications of material and labor required in the erection and entire completion of a Memorial Building for the town of Milford, said building to be erected on the corner of Spruce and School streets in said Milford, and to be built in accordance with drawings and these specifications, furnished by Frederick Swasey, architect, of said Milford, and under his superintendence. Conditions. The contract will include all labor and material necessary to carry into entire completion all the works of every name and nature shown by drawings, except such parts as the specifications expressly designate to be furnished by the town. . . . . No charge of any kind shall be made for extra work except said work be ordered in writing by said architect. All orders for extra work or claims therefor must be presented to the committee within thirty days from the issue of said order."

The first question which arises under this action of the town is, whether the plan and specifications reported by the committee were adopted by the town as a limitation upon the powers of the committee. We think that they were, and that the committee was authorized to locate and build only according to the plan and specifications. This would require the committee to make one contract for the completion of the building. They could not materially change the location or the specifications for the building. The town had voted to build according to the specifications, and under one contract for the completion

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of the building, and had authorized the committee to build. While it was the duty of the committee to make a contract for the completion of the building in substantial accordance with the specifications, they had authority to add to or to change the specifications in order to remedy defects in them, and to improve them in minor details, within reasonable limits. This authority would be implied, and it was recognized in the specifications themselves, in the provision regulating claims for extra work. Of course extra work — work not included in the general contract — must be done under particular contracts, and such contracts could be made with the general contractor or with any other person. We cannot say that the committee did not have authority to contract for the extra work which the plaintiff says he performed. This question does not appear to have been raised at the trial, and the evidence is not stated with reference to it. The principal item of the plaintiff's account is for brown-stone trimmings. It does not appear what the specifications were which were changed, nor what, if any, the increased cost was, nor how important the change was. The other items are all for extra labor, and vary in amount from $200 to $1000. No evidence whatever was offered in regard to them, and we cannot say that the committee had not authority to make contracts for the labor described.

After the votes of the town, the committee made the contract with Mead, Mason, and Company, by which the price to be paid for the building was $20,324.40. The defendant contends that the committee was limited to an expenditure of $20,000, and that, having contracted for more than that amount, they had no authority to make a contract which involved any further payment. We have already said that we do not regard the vote adopting the report of the committee as a vote that the expenditure should be limited to $20,000.

It is further argued that the committee could not make any contract which involved an expenditure in excess of the whole amount appropriated by the town, $22,000. The vote does not expressly prohibit the committee from incurring liabilities beyond the amount of the appropriation, and we do not think that such prohibition can be implied. While it was probably intended to make an appropriation large enough to cover the

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contract price and such "extra work" as would be likely to be required, there seems to be no prohibition against contracting for "extra work" beyond the amount of the appropriation, if circumstances should justify and require it. Under what circumstances such a contract would be valid we need not consider, because it is not material to the decision of the question before us. It does not appear that the contract in question involved an expenditure beyond the amount appropriated. There was $1675 left of the appropriation, after the payments provided for by the contract with Mead, Mason, and Company. It is probable that some of this was used, but that does not appear in evidence. The plaintiff appears to have sued for the entire cost of the brown-stone trimmings, on the ground that the contract for them was made directly with him. There would presumably be an allowance made by the plaintiff to Mead, Mason, and Company, and by them to the defendant, for corresponding items in the specifications of which these took the place. How much that would be does not appear, though there is some evidence that it was supposed by the committee that the expense would not be increased by the substitution. It may be that the reduction from the contract price would equal the amount of the plaintiff's charge. The other items of the plaintiff's account are for labor, and no two of them exceed the amount of the appropriation apparently remaining not used; it may be that all the "extra work" done by the plaintiff would not exceed that. These matters were rendered immaterial by the ruling of the court, and no evidence was offered in regard to them.

The course of the trial is apparent from the exceptions. The plaintiff put in documentary evidence to prove the authority given to the committee by the defendant. He then proceeded to prove that authority was given by the committee to Swasey, and that Swasey ordered the work done; and called one Stratton, a member of the committee, and offered to prove by him that three members of the committee, including Swasey, who was a member of the committee as well as the architect, stated to him that they agreed to the change, and that he agreed to it, and that Swasey, in the presence of the witness, told the plaintiff that he had seen the committee, or a majority of the committee, and they had agreed to have the brown-stone trimmings. The

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testimony of this witness was objected to, and was heard *de bene* by the court, and at its conclusion, on the statement by the counsel for the plaintiff, that he relied upon no other or different kind of evidence to prove authority in Swasey than the documentary evidence, and the statements of members of the committee, such as those testified to by Stratton, the ruling was made by the court. The ruling, as we understand it, was to the effect that any evidence of the action of the committee except when it was in session as an organized body was not competent; that the evidence offered by the plaintiff should be excluded; and the corollary from that, that there was no evidence in the case sufficient to show authority in Swasey to make the contracts with the plaintiff. Under this ruling, evidence that all the members of the committee agreed to authorize Swasey to order the change, that Swasey did in fact order it in writing, that the plaintiff's claim was duly presented to the committee, or that any of these things had been in any way dispensed with or waived, became immaterial and incompetent. The ruling of the court that the evidence was not sufficient could not have been on the ground that the plaintiff did not insist upon putting in evidence that the members of the committee agreed to the change, or that Swasey ordered it, after he had stated the character of the evidence that he had to offer, and the court had ruled that it was not competent.

But if the ruling that the evidence was not sufficient can be separated from the ruling that the evidence of agency was incompetent, and taken as an independent ruling upon evidence in the case, we think that it cannot be sustained. Swasey was the architect, having superintendence of the whole work, and through whom orders for extra work must pass, and was also a member of the committee. The testimony of Stratton was sufficient to show that, after there had been conversations among members of the committee, and between members and the plaintiff, in regard to having brown-stone trimmings, Swasey told the plaintiff that the committee, or a majority of the committee, had agreed to have it done, and that the plaintiff went on and did the work, with the knowledge and approval of the committee, and that the work was accepted by the committee. This was some evidence of agency in Swasey, and of action by the

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committee to authorize additional work, that is, the substitution of brown-stone trimmings for the corresponding specifications. The words "at additional expense" in the ruling are immaterial, as applied to the item for brown-stone trimmings at least, because it does not appear that any additional expense was involved. The record does not show it; the item does not purport to be for extra work as the others do. The evidence only tends to show a contract with the plaintiff to furnish the trimmings, as a substitute for a contract with Mead, Mason, and Company to furnish some other trimmings; but there is no presumption or evidence that it was to be at an expense additional to the appropriation, or even to the contract price. The action of the plaintiff is to recover the full worth of the trimmings which he furnished under a contract between him and the defendant, through Swasey, thereto authorized by the committee. If a valid contract was made, and he performed it, he is entitled to recover according to its terms. If one of its terms was that it should not increase the cost of the building over the contract price, then the plaintiff can recover only so much as the contract price was reduced by his contract. It is not matter of law, nor a fact in the case, that the contract price has been paid in full, nor that it has not been reduced on account of the plaintiff's contract by more than enough to pay his claim.

We think, however, that the ruling must be taken to be a ruling that the evidence offered was not competent to prove any action of the committee, and that the plaintiff had for that reason failed to prove his case, and not as a ruling as to the sufficiency, to prove every part of the plaintiff's case, of evidence offered only to prove one part, and held to be incompetent for that. *Exceptions sustained.*

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INHABITANTS OF SOUTH SCITUATE *vs.* INHABITANTS OF STOUGHTON.

Plymouth. Oct. 18, 1887. — Jan. 6, 1888. C. ALLEN & KNOWLTON, JJ., absent.

In an action by one town against another town for relief furnished a pauper, evidence is inadmissible, on the issue whether the pauper had his domicil in the defendant town, that, at a previous time, the overseers of the poor of the defendant town, on being notified by a third town that the pauper was in need of relief, took the pauper to their town and furnished such relief. And the fact that the records of the defendant town have been destroyed by fire does not make the evidence admissible.

W. ALLEN, J. This is an action to recover for relief furnished by the plaintiff town to a pauper.

The only controverted question was whether the pauper's settlement was in the defendant town. Her father had a settlement in the town of North Bridgewater, and she derived a settlement there from him. In the year 1851 she was married in that town. There was no evidence that her husband had a settlement in the defendant town, or that she ever acquired a settlement there, unless certain acts of the overseers of the poor of that town are competent for that purpose. These acts were the removal of the pauper and her children, after her marriage, from North Bridgewater to the defendant town, by its overseers of the poor, and relief furnished to them there at different times, and the payment by the defendant to North Bridgewater of bills presented for the support of the pauper. The circumstances attending the marriage of the pauper, and these acts of the overseers of the poor, might affect the weight of this evidence if it were competent, but they cannot affect the question of its competency.

1. The evidence is not competent to show an estoppel under the statute. The Rev. Sts. *c.* 46, §§ 19–21, which were in force at the time of the acts under consideration, are substantially the same as the Pub. Sts. *c.* 84, §§ 28–30, and provide that the overseers of the poor may send a written notice, stating the facts in regard to a person who has become chargeable to their town, to one or more of the overseers of the place where his settlement is

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supposed to be, requesting them to remove him; if the removal is not made within two months after the notice, a written answer stating the objections to the removal shall be sent; and if that is not done, the overseers who requested the removal may remove him to the place of his supposed settlement, and the overseers of that place shall receive and provide for him, and their town shall be liable for the expenses of his support and removal, to be recovered in an action by the other town, "and shall be barred from contesting the question of settlement . . . . in such action." The estoppel is plainly limited to the action and to the parties to it. It does not arise in favor of third parties, nor between the parties themselves, when, as in the case at bar, the overseers of the town notified voluntarily remove the pauper and pay the expenses. *Bridgewater* v. *Dartmouth*, 4 Mass. 273. *Edgartown* v. *Tisbury*, 10 Cush. 408.

2. The acts of the overseers of the poor in removing the pauper to their town and supporting her, and in paying to North Bridgewater the expenses of her support, are not competent as admissions by the defendant. The overseers in these respects acted as public officers, and not as agents of the town. Their acts, whether in removing the pauper, or in providing for her support in their town, or in ordering payment for her relief furnished by North Bridgewater, bound their town by authority of law, and not by authority of the town, and cannot be taken as admissions by the town or its agents. *New Bedford* v. *Taunton*, 9 Allen, 207. *Dartmouth* v. *Lakeville*, 7 Allen, 284, and 9 Allen, 211, note. *Oakham* v. *Sutton*, 13 Met. 192. *Edgartown* v. *Tisbury*, *ubi supra*.

We do not see that the loss of the records of the defendant town for the year when the overseers of the poor removed the pauper, and furnished relief to her, at all affects the question. One answer to the argument for the plaintiff that the acts of the defendant's overseers of the poor are secondary evidence of the contents of the record kept under the Pub. Sts. *c.* 27, § 72, is that there was no provision for such record until after the acts were performed. St. 1877, *c.* 186.

Judgment for the defendant.

J. F. Simmons, for the plaintiff.

O. A. Marden, for the defendant.

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LEGRAND C. TIBBETTS, petitioner, *vs.* CALVERT HANDY.

Nantucket. Oct. 25, 1887. — Jan. 6, 1888. C. ALLEN & KNOWLTON, JJ., absent.

If an appeal is taken to the Superior Court from a judgment of a trial justice, under the Pub. Sts. *c.* 155, § 28, and the appellant fails to recognize to the adverse party, as required by § 29, or to deposit with the trial justice a reasonable sum as security for the prosecution of the appeal and the payment of costs, the Superior Court has no jurisdiction of the appeal; and, on a petition to that court for leave to enter the appeal, parol evidence is inadmissible that the appellant offered to recognize, or to deposit a reasonable sum as security, and that the trial justice refused to allow him to do either.

PETITION to the Superior Court for leave to enter an appeal, alleging the following facts:

On October 7, 1886, Thomas B. Field, Esquire, a trial justice for the county of Nantucket, in an action of contract brought against the petitioner by the respondent, rendered judgment against the petitioner for the sum of $17.20, damages, and $8.40, costs of suit. Within twenty-four hours after said judgment, the petitioner appealed from said judgment to the Superior Court, and offered within said time to recognize to the adverse party, with sufficient sureties, to be approved by the adverse party or by the justice, in a reasonable sum, namely, the sum of $110, with condition to enter and prosecute his appeal with effect, and to satisfy within thirty days of the entry thereof any judgment which might be entered against him in the Superior Court for costs. The trial justice refused, contending that a written bond, signed and sealed by the principal and sureties, should be given. The petitioner also offered within said time to deposit with said trial justice such reasonable sum, to be fixed by the justice, as security for the prosecution of the appeal and the payment of costs, and was ready and willing so to do, under the provisions of the Pub. Sts. *c.* 155, § 30. This the trial justice refused, contending that a bond as aforesaid only could be given. Such reasonable sum was duly tendered to said trial justice, and the petitioner is now ready to bring it into this court. He subsequently gave such bond, but under the statute

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such bond is void, and will not permit a lawful entry of the appeal in the Superior Court.

Accompanying the petition was a record of the trial justice, from which it appeared that judgment was entered and an appeal taken, as alleged in the petition. There was also a copy of a bond, signed by the petitioner with sureties, and the sureties were approved by the trial justice on October 7, 1886.

On the first day of the sitting of the court to which the appeal was taken, the respondent moved to dismiss the appeal, because the petitioner did not enter into a recognizance, as required by the Pub. Sts. *c.* 155, § 29.

On the same day the petitioner filed the petition to enter his appeal.

The motions were heard together by *Thompson*, J., who ruled, as matter of law, that the petition could not be granted, even if the petitioner proved all the allegations set forth in the petition; and dismissed the appeal. The petitioner alleged exceptions.

J. Brown, for the petitioner.

H. B. Worth, for the respondent.

W. ALLEN, J. It must be taken to be settled law, that an appeal under the Pub. Sts. *c.* 155, § 28, cannot be allowed, (except under the exception in § 29,) unless the party appealing recognize according to the provisions of § 29, although he may not be in fault, and may be ready and may offer to recognize. *Parker* v. *Snow*, 143 Mass. 423. *Henderson* v. *Benson*, 141 Mass. 218, and cases cited. The same rule must be applied to the provisions of §§ 30–32, which constitute the exception in § 29. They authorize, in lieu of the recognizance, a deposit by the appellant with the trial justice of a reasonable sum, to be fixed by the justice, a certificate of which shall be issued by him to the depositor, and provide that the trial justice shall transmit the sum deposited to the clerk of the Superior Court, with the papers, and that the clerk shall hold such sum until the final disposition of the case, when he shall pay it as the court may order.

The record of the trial justice does not show any deposit with the justice, or any offer to make a deposit. On the contrary, a copy of a bond approved by the justice, with the same condition

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as is required in a recognizance, is among the papers produced in the Superior Court.

We think that the ruling of the court was right, and that it was not competent for the defendant to show compliance with the statutory provisions by parol evidence that he offered to recognize, or that he offered to deposit with the trial justice, and tendered to him, a sufficient sum in lieu of a recognizance, which recognizance or deposit the justice refused to accept. If the defendant without fault failed to perfect his appeal, he has his remedy, not by treating the appeal as perfected, but by proceedings in review. *Keene* v. *White*, 136 Mass. 23.

Exceptions overruled.

CHARLES E. CARR *vs.* INHABITANTS OF BERKLEY.

Bristol. Oct. 27, 1887. — Jan. 6, 1888. C. ALLEN & KNOWLTON, JJ., absent.

Under the Pub. Sts. c. 49, § 71, it is sufficient if the laying out of a town way is filed in the office of the town clerk seven days at least before the town meeting at which the laying out is reported by the selectmen and accepted; and the report to the town is not required to be filed seven days before such meeting.

The laying out of a town way is not invalidated by the fact that one course is stated to be "41½° E." instead of "N. 41½° E.," if there is no ambiguity in the whole description.

PETITION to the Superior Court for a jury to assess damages for the taking of land, by the respondent, to lay out a highway in the town of Berkley. Hearing in the Superior Court, before *Barker*, J., who ruled that the way was not legally laid out, directed a verdict for the respondent, and reported the case for the determination of this court. The facts appear in the opinion.

J. M. Morton, for the petitioner.

W. H. Fox, for the respondent.

W. ALLEN, J. The Pub. Sts. c. 49, § 65, provide that the selectmen of the several towns may lay out town ways. Section 71 provides that no town way laid out by the selectmen shall be

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established until such laying out is reported to the town, and accepted and allowed at a town meeting warned and notified therefor; nor unless "such laying out" is filed in the office of the town clerk seven days at least before such meeting.

In this case, the selectmen proceeded in literal compliance with the statute. On February 17, 1886, they laid out the way, and on the next day they filed the laying out with the town clerk. After that a warrant was issued for a town meeting, to be held on March 1, to take action upon the report of the selectmen in laying out the way. On February 27, after the warrant was posted and before the day of the meeting, the selectmen filed with the town clerk a paper which was intended to be a copy or duplicate of the paper before filed, with the following words added: "The laying out with the boundaries and admeasurements have been filed with the town clerk on the 19th day of February, 1886, being seven days before this meeting; and we now hereby report such laying out, with the boundaries and admeasurements of the same, to said town, at the meeting of the legal voters regularly warned and notified, for them to accept and allow the same." The statute does not require that the report to the town of the laying out shall be made seven days before the meeting, and it does not require that the laying out filed in the clerk's office for the examination of all parties interested, and that reported to the town for its action, shall be contained in the same writing. Both may be combined in one; and in this case the papers first filed might have been treated as a report, and acted on by the town; but it was not necessary to do that when a formal report was properly before the meeting.

It is objected that the laying out filed with the clerk on February 18 was uncertain in description because it gave one course as "41½° east" instead of "N. 41½° east." But there is no ambiguity in the whole description. The other courses and the distances and monuments have no uncertainty.

Verdict set aside.

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EMMA F. CLEAVES *vs.* PIGEON HILL GRANITE COMPANY.

Essex. Nov. 1, 1887. — Jan. 6, 1888. DEVENS & KNOWLTON, JJ., absent.

In an action for personal injuries sustained by the plaintiff, by reason of the carriage in which he was driving being struck by a car on the defendant's railroad at a place where it crossed a way at grade, there was evidence that the car, which was slowly descending an incline by the force of gravity, was in charge of a brakeman, and could have been stopped in a short distance if the brake had been applied. There was also evidence that the plaintiff was driving at a moderate trot; that, as he approached the crossing, his head was turned towards the side from which the car was approaching; that the hind wheel of the carriage alone was struck; that as the carriage approached the crossing it was visible from the car; and that cars did not ordinarily run at that time. The plaintiff was so injured that he was unable to give any account of the occurrence. *Held*, that there was evidence proper to be submitted to the jury on the questions whether the plaintiff was in the exercise of due care, and whether the defendant was negligent.

TORT, for personal injuries alleged to have been sustained by the plaintiff, by reason of the carriage in which she was driving being struck by a car on the defendant's railroad in Rockport, at a place where the railroad crossed a private way at grade. Trial in the Superior Court, before *Mason*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff is the owner of a messuage bounding on a private way over which she usually passed to and from her dwelling-house to the public highway. There was no question as to the plaintiff's right over said private way. She built her house on the lot in 1878.

The defendant is the owner of a quarry a short distance above said private way, and is the owner of land on both sides of said private way from the main highway to the quarry.

In 1874, the defendant laid a tramway from this quarry over its land, across said private way, to its wharf at tide water, and has since conveyed stone in cars over the same from the quarry to the wharf, where the stone is loaded into vessels. The cars descend from near the quarry to the wharf, on a down grade, by their own momentum, the descent of the tramway both above and below the crossing being so steep as to require the constant application of brakes to control the car. The cars are

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controlled only by brakes, and only one car goes down at a time. The distance from the plaintiff's house to the tramway crossing on said private way is about seven hundred feet, and from said crossing to another private way, which passes the former at right angles and leads to the main highway, about three hundred feet.

The plaintiff introduced evidence tending to show that she had been in the habit of driving almost daily over this crossing, and on the day of the accident had passed over it a few hours before; that she had been in the habit of driving horses; that she had seen cars pass down over this crossing frequently during the day until six o'clock P. M., but had never seen them pass down after that time; and that she had no recollection whatever of the circumstances under which she was injured, and could not recall any circumstance connected with the affair. It was in evidence that plaintiff was unconscious for ten days after the injury.

There was evidence tending to show that the running of the defendant's cars after six o'clock P. M. was not a frequent occurrence; that a steam whistle on the defendant's works was blown at a quarter before six o'clock P. M., and was the usual signal for stopping the defendant's work; that the whistle had blown at the usual time on the day the plaintiff was injured; that the defendant had no flagman at this crossing, and had provided no means whatever to give notice to travellers upon the private way of the approach of a car; and that the plaintiff had never seen a flagman at the crossing. There was no evidence that she knew that any warning had ever been given of the approach of cars.

One O'Brine testified, for the plaintiff, that he was standing upon the highway about two hundred feet distant from the crossing; that he saw the car about a quarter past six in the afternoon coming down the track, and saw the plaintiff pass the barn of one Curtis, on the private way; that the car came down over the hill at the usual rate of speed, going about as fast as a man ordinarily walks; that nothing attracted his attention as to the speed at which the car was run; that he saw the plaintiff coming upon the crossing; that the horse was going at a good trot, nothing out of the way at all; that, as the plaintiff crossed, the car struck the hind wheel of the buggy, knocked it around, and

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the buggy went along on one side to the culvert, before it tipped over and the plaintiff was thrown out; that the car was loaded with stone; that he saw the brakeman on the car, but did not see him do anything; and that he could not tell how the plaintiff was sitting in her carriage; but thought she was looking straight ahead, going on about her business.

Upon cross-examination, the witness testified that just after the accident he had told a person that he thought the car struck the buggy, but that he would not swear to it.

Annie Ahearn testified that she saw the plaintiff turn into the private way some eight hundred feet distant from where the witness stood, and drive along to Curtis's barn; that the plaintiff was sitting in her carriage, and was looking towards the left, and in the direction the car was approaching; and that she did not see the plaintiff after she passed Curtis's barn.

One Dolliff testified that she saw the plaintiff pass said Dolliff's house, sitting in an open buggy, on the right side of the buggy; that the horse was going at a slow trot; that the plaintiff was holding the reins in her hands, also the whip; that the witness observed the plaintiff a short distance past Curtis's barn; that the plaintiff's head was turned towards the trees on the corner to the left where the track comes down; that the witness was sitting at an open window in her house; that her attention was withdrawn for a moment while the plaintiff was near Curtis's barn; that, on hearing the sound of the car, the witness looked again, and saw that the plaintiff's carriage had just passed across the last rail of the tramway, and seemed to be out of the road and tipped on one side, and it went along until she was thrown out near the stone wall; that the witness did not see the car at all, but before she looked out of the window the second time she heard an unusual noise of the car, but could not say whether it was above or below the crossing; and that she had seen the plaintiff often drive over this road.

The evidence of both the plaintiff and the defendant was, that the defendant's car did not stop at all, from the time O'Brine saw it coming down above the crossing, until it had passed over the crossing and had reached the defendant's wharf.

The plaintiff also introduced evidence, upon the question of a collision having taken place between the buggy and the car,

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of the condition of the left hind wheel of the plaintiff's buggy, to the effect that there was a cut on the tire of the wheel; that the spokes were started in the hub, and the axle was sprung. This evidence was by witnesses who examined it afterwards.

Arthur M. Waite testified that he had examined the defendant's cars, and the brakes attached to them; that the brakes were not sufficient to stop a car quickly, if going as fast as a man could walk; that they would not stop it within ten or fifteen feet, and that the brake would not stop the car quickly if it was going but little faster than a man could walk, and was loaded and moving down the hill.

The foregoing was all the evidence for the plaintiff upon the question of due care on her part, and negligence on the part of the defendant. The defendant asked the judge to rule that there was no evidence to go to the jury which would entitle the plaintiff to recover. The judge declined so to rule.

The defendant offered evidence in rebuttal of Waite, to the effect that the cars had been stopped, when going as Waite described, within five feet.

One Knights testified, for the defendant, that he was in charge of the car as brakeman at the time of the accident; that he saw the plaintiff first as she came on to the crossing by the trees, the car being about sixty feet from the private way as the horse's head came in sight on the track; that the horse was going a fair trot at the time; that the car was moving as fast as a man ordinarily walks; that he turned the brake to slow up the car, as the plaintiff went over the crossing; that the plaintiff passed over the track and went as far as the culvert, when she went out of her carriage about thirty feet from the track; that the car was twenty-five or thirty feet from the crossing when the plaintiff went out of her carriage; that the car did not strike her carriage nor come within twenty-five feet of it; that he had run cars ten to eleven years, about twenty a day on an average; that he had run cars when they had vessels to load as late as eight o'clock P. M., and that the time for the whistle to blow was a quarter to six o'clock P. M.

Upon cross-examination, the witness was asked if he did not tell Mrs. Brown that he did not think the car struck the plaintiff's

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carriage, but he could not tell; to which he replied that he did not.

One Parker testified that, from his chamber window on the highway, he saw the plaintiff pass from Curtis's barn over the crossing towards the culvert, going a good fair gait; that she crossed the track before the car came to the crossing; that the car was thirty feet above the crossing after she passed; that the car did not touch the carriage; and that the whistle was blown at a quarter before six o'clock, but cars ran after that time when there was a vessel to load.

One Cunningham testified that at the time of the accident he was on the main highway as flagman; that he saw the plaintiff come past Curtis's barn, and observed her till she crossed the track and was thrown out at the bridge or culvert; that her horse was going a fair jog; and that when she crossed the track the car was from twenty to twenty-five feet up the track, and did not come in contact with the plaintiff's carriage.

Upon cross-examination, the witness testified that O'Brine, who stood near him at the time of the accident, called at the stable one evening thereafter, and had a discussion with him as to whether the car struck the plaintiff's carriage; O'Brine contending that it did, and he, the witness, that it did not; and that, upon the third evening after the accident, in consequence of the talk with O'Brine, the witness went to the plaintiff's stable to examine the carriage to satisfy himself.

Upon direct examination the witness testified that he did not find any mark on the nigh hind wheel, but found a scratch on the off hind wheel.

The defendant offered evidence tending to show that the stones covering the culvert were elevated above the roadway.

One Botanico testified that he saw the plaintiff turn into the private way, going towards the railroad crossing; that he, with a friend, was going home, and just as he came upon the private way he saw the plaintiff thrown out of her carriage at the culvert; that he ran towards the plaintiff, and when he came near Curtis's barn, the car passed down across the private way; that he had not seen the car before; that he knew the brakeman by sight; and that he went over to where the plaintiff was, with his companion Tocchi.

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Tocchi testified to the same facts sworn to by Botanico.

Mrs. Brown testified, in rebuttal, that Knights, the brakeman, told her he thought the car did not strike the plaintiff's carriage, but that he could not tell.

This, with a description of the locality at the time of the accident, was all the testimony bearing upon the question of negligence of the defendants, and due care on the part of the plaintiff, at the time of the accident.

The defendant requested the judge to give to the jury the following instructions, among others: "1. There is no evidence which would warrant the jury in finding a verdict for the plaintiff. . . . . 8. Upon the whole testimony in the case, there is no evidence of due care on the part of the plaintiff, and negligence on the part of the defendant, which would justify a verdict for the plaintiff. . . . . 16. Negligence cannot be inferred from the happening of the accident to the plaintiff; and, upon the whole of the plaintiff's evidence, the jury would not be warranted in finding that the defendant was guilty of negligence."

The judge refused to give the first and eighth instructions requested. The first part of the sixteenth request was given, and the last part, namely, "and, upon the whole of the plaintiff's evidence, the jury would not be warranted in finding that the defendant was guilty of negligence," was refused.

The judge gave general instructions to the jury, to which no exception was taken.

The jury found specially, in answer to questions submitted to them, that there was a collision between the defendant's car and the carriage in which the plaintiff was riding, and that said collision was occasioned by the negligence of the defendant, and returned a general verdict for the plaintiff in the sum of $5500. The defendant alleged exceptions to the refusal to give the instructions above set forth.

N. Morse & C. Sewall, for the defendant.

H. P. Moulton, (*H. N. Woods* with him,) for the plaintiff.

W. ALLEN, J. There was evidence that the plaintiff was driving at a moderate trot, and that the defendant's car was going about as fast as a man ordinarily walks; that the car was moved by gravity only, and could be stopped by the brake in going a distance of five feet, according to the evidence for the

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defendant, and of ten to fifteen feet, according to the evidence for the plaintiff; that the plaintiff's horse and carriage had crossed the track in front of the approaching car so far that the hind wheel was struck by the car, in such a manner that the carriage was not prevented from going along twenty or twenty-five feet in the road before the plaintiff was thrown out. The jury may well have found that the speed of the car was not slackened. The brakeman upon the car testified that he saw the plaintiff's horse as soon as it appeared upon the track, and that the car was then sixty feet from the crossing; that he turned the brake to slacken the speed of the car, and that the car at no time was within twenty-five feet of the plaintiff's carriage. Several witnesses testified that they saw the car at the crossing, and before it reached it, but no one testified that there was any diminution in its speed; one said that he saw the brakeman, and did not notice that he did anything. The jury may well have found that the speed of the car was not checked, and that, if the brake had been applied when the plaintiff's horse first went upon the track in sight of any person upon the car, the collision would have been prevented; and that, whether the collision was without the knowledge of the brakeman, or whether he falsified in his testimony in regard to it, it was caused by his negligence.

The plaintiff, according to the evidence, was so injured that she had no recollection of anything connected with the accident, and could not give testimony as to her care at the time. It was in evidence that she was accustomed almost daily to drive over this crossing. Several witnesses who saw her before she reached the crossing testified to the manner in which she was driving. Four witnesses testified that they saw the plaintiff drive over the crossing. They described her manner of driving as fully as the parties asked them to, and it was for the jury to say whether she was driving in an ordinary way and with ordinary care, unless some fact appeared which showed, as matter of law, that she was negligent. Unless there was some such fact, the question was plainly for the jury.

Three of these witnesses testified that, when the plaintiff drove over the crossing, the car was twenty-five or thirty feet from her, and their testimony alone would justify no inference but that she was in the exercise of ordinary care. It is true that the jury

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found that these witnesses were wrong as to the position of the car, but they were called by the defendant, and they did not testify to anything in the plaintiff inconsistent with ordinary care. The other witness, the only one of the four called by the plaintiff, also testified to a fact which the jury found to be true, and which the defendant claims was in law negligence, and took the question of due care from the jury, that the car struck the hind wheel of the plaintiff's carriage. However strong evidence of negligence in the plaintiff this may have been, it clearly was not conclusive. Even in the case of a steam railway, the fact of a collision at a crossing between the engine and a traveller has never been deemed conclusive evidence that the traveller was wanting in due care. See *Tyler* v. *New York & New England Railroad*, 137 Mass. 238. There was evidence that it was unusual for cars to pass at that hour, and that the plaintiff had no reason to expect one; there was evidence that the plaintiff was looking in the direction from which the car was coming. There was no evidence that the car could be seen by her until she herself came upon the track, while there was evidence that her horse could be seen from the car before she or her carriage reached the track; and if she had seen the car, and attempted, of choice, to pass before it, it would be a question for the jury whether the act was negligent. The car was moving slowly, and was easily controlled, in these respects resembling an ordinary carriage more than a locomotive engine. The plaintiff had a right to expect that it would do something towards avoiding a collision, and, while that would not justify the plaintiff in putting herself in a dangerous position, it might be an element in determining whether a certain position would be dangerous, just as the fact that a horse is under its driver's control is an element in determining whether it is dangerous to pass in front of it. A driver who at a crossing of streets sees that he apparently can go safely before a horse and carriage approaching on a cross street is not, as matter of law, obliged to stop and wait for the other to pass, unless he is certain that he has made no mistake in his estimate of speed and distance; he may have a right to pass in front, and to assume that, if necessary, the speed of the other will be checked. So, in this case, the fact that the speed of the car could be checked, if there should prove to be danger that it

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would run into the plaintiff's carriage, was a fact proper to be considered by the jury in determining whether the plaintiff was negligent in making a slight miscalculation, which could be remedied by proper management of the car.

We think that the question whether the plaintiff was in the exercise of due care was for the jury, and that the rulings excepted to were correct. *Exceptions overruled.*

KATE T. LIFFIN *vs.* INHABITANTS OF BEVERLY.

Essex. Nov. 2, 1887. — Jan. 6, 1888. DEVENS & KNOWLTON, JJ., absent.

In an action against a town for an injury occasioned by an alleged defect in a way, the notice to the town stated, as the cause of the injury, that the way was "defectively constructed and left in a dangerous and unfinished condition." The plaintiff offered to prove that her foot went into a hole caused by a defective construction of the way. *Held*, that the notice was sufficient, under the St. of 1882, c. 36, unless there was an intention to mislead, and the defendant was in fact misled; and that these questions were for the jury.

TORT, for personal injuries occasioned to the plaintiff by a defect in a way in Beverly, which the defendants were bound to keep in repair. Trial in the Superior Court before *Bacon*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff's counsel, in opening his case to the jury, offered to prove the following facts.

There is in the defendant town a public highway called Elliot Street, on which the plaintiff lives. On December 24, 1884, the plaintiff, while travelling upon said street, and in the exercise of due care, struck her foot against a hard substance of either snow or ice. At the same time her foot broke through the ice on which she was standing, and went into a hole about four or five inches in depth and her leg was broken. At the time of the accident there was no defined sidewalk constructed at the place where the injury happened. On the side of the way where the plaintiff was injured was a large depression, forming a basin, where snow, ice, and water would remain in the

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winter; and, when said depression or basin got filled with water or snow, the water ran across said way, and washed away, and gullied out a passageway for itself across said way, making the way dangerous. The way where the injury occurred was improperly constructed, and allowed to remain in a dangerous and unfinished condition.

The plaintiff offered in evidence the following notice, addressed to the selectmen, signed by her, and handed to the town clerk:

"You are hereby notified that on December 24, 1884, about two o'clock in the afternoon, I fell down on the northerly side of the travelled way, nearly in front of the dwelling-house occupied by George Tufts on Elliot Street in Beverly, in said county of Essex, and received bodily injuries. The place where I received said injury may be found as follows: beginning at the southwesterly corner of the dwelling-house occupied by said Tufts on said Elliot Street, and thence running southerly on a line at right angles with the front of said house about fifty-seven feet to a point on the northerly side of said travelled way, and running westerly by said travelled way about ten feet to the place where I received the aforesaid injury. The cause of my injury at the time and place aforesaid was: 1st. A defect in said travelled way on said Elliot Street, by reason of an accumulation of snow, ice, and hobbly and rough snow and ice, making said place where I received said injury rough, hobbly, slippery, uneven, and dangerous; and 2d. That said travelled way, where I received said injury, was defectively constructed, and is now, and was at the time of the injury, left in a dangerous and unfinished condition."

The defendant objected to the case opened by the plaintiff, on the ground that the notice did not state the existence of a hole or gully in the street, by means of which the plaintiff received her injury. The defendant also contended that it was misled by the notice; and no evidence was offered by the plaintiff to show that the defendant had not in fact been misled.

The judge sustained the defendant's objections, and ruled that the plaintiff could not recover for an injury caused by the existence of the hole or gully described in the plaintiff's opening, because the notice did not describe such a defect; and, upon the plaintiff's counsel stating that he relied upon and

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proposed to prove the case opened to the jury, a verdict for the defendant was ordered. The plaintiff alleged exceptions.

D. W. Quill, for the plaintiff.

H. P. Moulton, for the defendant.

W. ALLEN, J. The St. of 1882, *c.* 36, provides that a notice shall not be deemed to be insufficient by reason of any inaccuracy in stating the cause of the injury, if it is shown that there was no intention to mislead, and if the party entitled to notice was not in fact misled.

The place of the injury is minutely described in the notice, and it is said, as a cause of the injury, that the way at that place was defectively constructed, and in a dangerous and unfinished condition. The plaintiff offered to prove that the way was imperfectly constructed, so that at times water would accumulate on its side and run over the way and gully out a channel across it, and that she broke through the ice into a hole or gully four or five inches deep, caused by such faulty construction of the way. The jury might have found that there was no intention to mislead, and that the defendant was not in fact misled by the notice. Suppose the plaintiff had proved her case as she opened it, and shown that, if one of the defendant's officers had gone to the spot designated in the notice, he could have found a way defectively constructed so as to collect the water in winter and pour it over the travelled path, and a hole or gully four or five inches deep caused by such defective condition, would not a jury be justified, in the absence of any evidence to the contrary, in finding that the defendant was not misled? The notice pointed to a particular place of the highway which it said was defectively constructed, and left in a dangerous and unfinished condition. It does not follow, from the fact that that particular defect was not mentioned, that the defendant was misled; and a jury would be authorized to find, upon proof of the facts stated by the plaintiff, and in the absence of other evidence, that there was no intention to mislead, and that the defendant was not in fact misled. *Fortin* v. *Easthampton*, 142 Mass. 486. *Canterbury* v. *Boston*, 141 Mass. 215. *Spellman* v. *Chicopee*, 131 Mass. 443. ***Exceptions sustained.***

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EDWIN C. SWIFT *vs.* JOHN CARR & another.

Essex. Nov. 2, 1887. — Jan. 6, 1888. DEVENS & KNOWLTON, JJ., absent.

A. and B. were in partnership under the name of B. and Company. B. withdrew from the firm, and A. carried on the business under the same firm name. Subsequently, A. sent to C., with whom the former partnership had had dealings, a letter with the printed heading, "A., under firm name of B. and Company." This letter was received by C. *Held*, that this heading was admissible in evidence on the issue whether C. had notice of the withdrawal of B. from the firm.

WRIT OF ENTRY, to recover a parcel of land in Newburyport, brought against John Carr and Elizabeth H. Carr, his wife. John Carr filed a plea of disclaimer, and died after the action was brought and before the trial, and his heirs came in under the same plea. Elizabeth H. Carr filed a plea of *nul disseisin*. Trial in the Superior Court before *Hammond*, J., who allowed a bill of exceptions, in substance as follows:

The demandant claimed title by virtue of a deed made to him, as purchaser at a sale duly made on a levy of an execution by a deputy sheriff, which execution was duly issued, after trial and judgment for the plaintiffs, in an action brought by Gustavus F. Swift and another, copartners under the firm name of Swift Brothers and Company, against said John Carr and Edward F. Coffin, as copartners under the firm name of Carr, Brown, and Company.

Said lot of land was attached on mesne process, in the above-named action, on April 5, 1884, and the execution was levied in due time and form, so that said attachment was in full force up to the time of said levy.

The tenant, Elizabeth H. Carr, claimed title by virtue of two deeds: the first, from John Carr to his daughter, Elizabeth M. Carr; and the second from said Elizabeth M. Carr to the tenant, Elizabeth H. Carr. Both deeds were dated March 1, 1880, and were both recorded on November 21, 1884.

The causes of action in the suit on which the attachment was made were five promissory notes, indorsed "Carr, Brown, and Company." These notes were delivered to Gustavus F. Swift, senior member of the plaintiff firm, in payment for horns sold by him through his agent, Tuttle Culver, residing in New York

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city, in pursuance of a contract entered into by the acceptance of a written proposition, and which, before maturity, became the property of said firm of Swift Brothers and Company.

Gustavus F. Swift had for two years before, in the years 1881 and 1882, through his agent, Tuttle Culver, sold horns to Carr and Coffin, under the firm name of Carr, Brown, and Company, and said Culver knew them as copartners under that firm name.

John Carr went to Chicago in May, 1883, and received said horns, and delivered on his arrival, about May 21, in part payment for the same, two of said five notes, one for $2500, and the other for $2000.

Culver met said Carr when he arrived in Chicago, and went with him to Gustavus F. Swift's place of business, introduced him to said Swift, and saw him deliver said notes.

Edward F. Coffin testified that he hired Carr to go and receive said horns, but there was no evidence that either Culver or Swift knew of such hiring. Coffin also testified that, when Culver was in Newburyport, on January 9, 1883, arranging with him for a settlement of a small balance due for the previous year's horns, he told him he was going to take the business, and that thereafter he was Carr, Brown, and Company. Coffin also testified that said firm of Carr, Brown, and Company was dissolved on February 1, 1883, and Carr retired from the firm on that date.

Culver testified that no such conversation took place, and that he had no notice of the dissolution of the firm of Carr, Brown, and Company until after the maturity of the five notes in the fall. Culver was the general agent of G. F. Swift.

As evidence bearing on the question of notice of dissolution of the firm of Carr, Brown, and Company, and of the withdrawal of John Carr therefrom, and to show that Swift Brothers and Company were not creditors of John Carr at the time of said attachment, in consequence of said notice, the tenant, Mrs. Carr, offered evidence that two letters, one bearing date June 18, 1883, and the other July 9, 1883, each containing one of the five notes, in part settlement for said horns, were mailed on those dates to Gustavus F. Swift, said letters having a printed letter-head as follows: "Edward F. Coffin, under firm name of

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Carr, Brown, and Company, manufacturer and dealer in horn combs, tips, and waste, Newburyport, Mass." To the admission of this evidence the demandant excepted.

The jury returned a verdict for the tenant; and the demandant alleged exceptions.

F. Hutchinson, for the demandant.

F. W. Hale, for Mrs. Carr.

W. ALLEN, J. At the trial it was deemed to be a material question whether John Carr was liable as a member of the firm of Carr, Brown, and Company to one Gustavus F. Swift, upon certain notes given by the firm to Swift. In 1881 and 1882 Carr and one Edward F. Coffin were copartners, under the name of Carr, Brown, and Company, and had transactions with Swift. Similar transactions were had between Carr, Brown, and Company and Swift in 1883, in the course of which five notes indorsed by the firm name were given by the firm to Swift in April, June, and July of that year. There was evidence that the firm was dissolved on February 1, 1883, and that Carr then retired, and that the business was afterwards carried on by Coffin alone, in the name of Carr, Brown, and Company. As evidence that Swift had knowledge that the firm had been dissolved, and that Carr was not a member, the defendant offered in evidence the printed letter-head of two letters dated respectively in June and July, 1883, sent to Swift, each containing one of the notes before mentioned, which letter-head was in these words: "Edwin F. Coffin, under firm name of Carr, Brown, and Company, Manufacturer and dealer in horn combs, tips, and waste, Newburyport, Mass." The only exception is to the admission of this evidence. The question is not as to the weight or sufficiency of the evidence, but only as to its competency. There was evidence that the letters were received by Swift, because he received the notes which were enclosed in them. That the statement at the head of the letter, that the name Carr, Brown, and Company, the indorser and sender of the note, was the business name of Coffin, was some evidence that Swift had notice that Carr had retired from the business, seems too plain for argument. The question whether that with the other evidence reported was sufficient, is not open on the exceptions.

Exceptions overruled.

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DANIEL McKENNA *vs.* NATHANIEL T. KIMBALL & others.

Essex. Nov. 3, 1887. — Jan. 6, 1888. DEVENS & KNOWLTON, JJ., absent.

Under the Pub. Sts. c. 44, § 46, which imposes upon the school committee of a town, unless the town otherwise directs, the duty of keeping "the school-houses in good order," and of providing "all things necessary for the comfort of the scholars," the committee may lawfully order a tree on a school-house lot to be cut down; and they are not liable for the negligence of those whom they employ to execute their order.

TORT, against the school committee of the town of Bradford. Trial in the Superior Court, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows:

The evidence of the plaintiff tended to show that there was a tree standing upon a lot of land, owned by the town of Bradford, which lot adjoined Main Street, a public highway in said Bradford; that on the lot there was a school-house used for a high school; that the defendants, who were the school committee at the time, decided by a vote taken upon the ground to cause the tree to be felled, and to employ one Knight, who was a highway surveyor, to fell the tree; that the three defendants directed Knight to fell the tree, and subsequently the tree was felled by two men other than Knight, but it did not appear by whose order, except as hereinbefore stated. There was no evidence or claim that Knight was not a proper person to employ to do such a piece of work. It did not appear that the town of Bradford had given any direction relieving the school committee of the duties imposed by the Pub. Sts. *c.* 44, § 46.

The plaintiff testified that he was at work on the highway for a horse-railroad company, grading the highway at a point opposite said school-house lot at the time said tree was being felled; that said tree fell across the highway, and a limb struck him upon the back and severely injured him; and that he heard no warning from anybody that the tree was about to fall. Two witnesses testified that they were at work with the plaintiff at the time the tree fell, and that they heard a shout of warning after the tree had begun to fall, but none before. There was evidence that no rope or support of any kind was used while the

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tree was being cut down. One witness testified that he looked at the roots of the tree after it had fallen, and that they had all been cut away except two, that all the roots extending sidewise from the tree had been cut, and the earth removed from about the base of the tree; and that the tree was about forty feet in height.

There was no other evidence of negligence of those felling the tree, or of due care on the part of the plaintiff.

The judge ruled that the action could not be maintained, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

W. H. Moody & E. B. Fuller, for the plaintiff.

S. A. Abbott & F. H. Pearl, for the defendants.

W. ALLEN, J. The Pub. Sts. *c.* 44, § 21, provide for the election of a school committee by each town, which shall have the general charge and superintendence of all the public schools of the town. The school committee is a board of public officers whose duties are prescribed by statute, and in the execution of its duties the members do not act as agents of the town, but as public officers in the performance of public duties. Besides the general provision before referred to, the statutes specify various duties required of the committee, and among them the care of school-houses. This duty is absolute in regard to high school houses. Pub. Sts. *c.* 44, § 41; *c.* 45, § 16. Since the abolition of school districts by the St. of 1882, *c.* 219, the Pub. Sts. *c.* 44, § 46, give the care of all the school-houses to the committee, unless the town otherwise directs. The language is the same in both provisions. The school committee "shall keep such houses in good order, and shall procure a suitable place for the schools, where there is no school-house, and provide fuel and all things necessary for the comfort of the scholars therein, at the expense of the town." Section 50 provides that the school committee of a town shall have the general charge and superintendence of the school-houses therein, so far as relates to the uses to which the same may be appropriated. The town of Bradford gave no direction in regard to the care of its school-houses, and it was the official duty of the defendants to care for them, with all the authority expressly or impliedly given to them as the school committee of the town. The committee voted to cause a tree

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standing on the high school lot to be cut down, and to employ one Knight, who was a highway surveyor, to fell it, and directed Knight to do so. The tree was afterwards cut down by two men, who, it may be assumed, acted under orders from Knight. Knight was a suitable person to be employed to fell the tree. The tree fell upon the plaintiff and injured him, as he alleges, in consequence of the negligence of the persons engaged in cutting it down. The only question is whether the defendants are responsible for the negligence of those persons.

If the school committee had authority to order the tree to be felled, the vote must be taken to have been a proper exercise of that authority. It does not appear that any notice of the meeting was required, and it does not appear what notice was given, but the committee were all present at the meeting. It is not necessary that the vote should have been upon a written motion. No objection was made that the vote was not proved by the record required by the Pub. Sts. *c.* 44, § 27, and the questions whether a record of the vote was made, and whether, if there was no record, the vote was therefore invalid, were not raised. See *Russell* v. *Lynnfield*, 116 Mass. 365. The defendants were not themselves negligent, and, if their vote was an official act, they are not responsible for the negligence of those whom they employed in carrying it out. The doctrine of *respondeat superior* is founded on the supposed benefit to the master of the act of the servant, and does not apply to a public officer employing agents in the discharge of a public duty. *Nowell* v. *Wright*, 3 Allen, 166. *Hill* v. *Boston*, 122 Mass. 344. Story on Agency, § 319.

The case is then narrowed to the single question, whether the school committee had authority to remove the tree from the lot on which the high school building was situated. If they had, they were the judges of the necessity and the propriety of its removal, and it was not necessary to recite in the vote the occasion for their action. It is immaterial whether the tree endangered the school building, or the children attending the school, or what the reason for its removal was. The right to remove it involved, or rather arose from, the duty of determining whether the removal was necessary. The town owned the school building and lot, but it had appointed no agent to have charge of it, and no officer had any authority over it, except the school committee. The

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duty expressly put upon the committee by statute, to keep the school-house in good order, and to provide all things necessary for the comfort of the scholars, included the care of the lot on which the house stood, as well as of the house. It was their duty not only to take proper measures to protect the school-house from threatened danger, but to see that the access to it over the lot from the adjoining street was safe and comfortable for the scholars, and that the lot was kept in proper condition for them to use in connection with the school-house. This would be included in their general duty of charge and superintendence of the school, if it was not within their specific duty in regard to school-houses. But we cannot doubt that the statute made it their duty to keep the lot, as well as the house upon it, in good order. If snow, or if a fallen tree, incumbered the lot, they could remove it; and they were not obliged to wait until the tree fell. It was their duty to exercise their judgment and discretion as to the necessity and propriety of cutting it down, and to act thereupon, and in so do doing they were acting as public officers, in the discharge of a public duty. *Exceptions overruled.*

EDMUND PYNE, JR. *vs.* JOHN WOOD, JR.

Essex. Nov. 4, 1887. — Jan. 6, 1888. DEVENS & KNOWLTON, JJ., absent.

In an action by an infant to recover money paid by him for an article of merchandise, there was evidence that the father of the infant made a demand for the money and caused the action to be brought, and that the infant was present when the demand was made, and returned the article to the defendant. *Held*, that the evidence would warrant a finding that the plaintiff had rescinded the contract. *Held, also*, that the fact that the infant testified at the trial that he was willing to stand by the contract, and did not wish the action prosecuted, was immaterial.

In an action by an infant to recover money paid by him for a bicycle, on the question whether the bicycle was a "necessary," it appeared that the plaintiff, a boy seventeen years of age, lived with his father, and worked in a shoe shop, a mile from his father's house; that he went home for his dinner, and was allowed to be absent an hour. The judge who tried the case without a jury found for the plaintiff. *Held*, that no error of law appeared.

CONTRACT, to recover the sum of $64, paid by the plaintiff, a minor. Trial in the Superior Court, without a jury, before

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Hammond, J., who allowed a bill of exceptions, in substance as follows:

On June 1, 1886, the plaintiff, who was then nearly seventeen years old, bought a bicycle of the defendant, and paid $30 in cash on account of the same. He also signed a paper writing by which he agreed to pay further sums of money from time to time. By the terms of the writing, the bicycle was to remain the property of the defendant until paid for, and he was to have the right to take possession of it, if the plaintiff made any default in payment.

The amount paid by the plaintiff in cash was a part of the money which he had saved from his own earnings. At that time he worked regularly in a shoe shop, earning $10 a week, out of which he paid his father for board $4 a week. There had been no special emancipation or giving away of the plaintiff's time, except what may be implied from the circumstances.

The plaintiff paid $12 on July 1, 1886, and $18 on July 28, 1886, and also on the last-named day exchanged the machine originally purchased for another, slightly different, and signed a new agreement similar to the former. He afterwards paid to the defendant $4 on general account. There was also charged against him, on account, $4 for repairing the bicycle.

The son paid all the cash out of his own earnings, to which the father had no claim other than that which might be asserted by a father to the earnings of a minor child.

At a later day the father demanded the money paid, but was refused payment by the defendant. He then demanded payment a second and third time, and was refused. Whereupon the father, leaving the bicycle at the defendant's shop, went away and caused this action to be brought. The boy was present when these demands were made, and also carried the bicycle to the defendant's shop when it was returned.

The defendant did not accept the bicycle in rescission of the contract, but claimed it as his under the contract.

The son testified that at the time of the trial he was willing to stand by the contract, and had no wish to have the present action prosecuted; but the judge found that the action was brought by his consent.

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It was in controversy whether the plaintiff returned the machine bought. On this point the judge found for the plaintiff.

A question was raised how far the bicycle was a "necessary," and it appeared that the plaintiff worked in Lynn, but resided in Swampscott, at his father's, more than a mile off; that during the hour allowed for dinner, he could easily go home to dinner, but that at least half of the hour allowed for dinner would be consumed in walking; and it was contended that it was impracticable for him to take his meals at home, unless he had a bicycle.

The judge ruled that the contract was voidable, and that an action in this form might be maintained by a next friend, in the name of the son, and found for the plaintiff. The defendant alleged exceptions.

S. H. Phillips & J. W. Porter, for the defendant.

I. B. Keith & C. Leighton, for the plaintiff.

W. ALLEN, J. There is nothing in this case to distinguish it from *McCarthy* v. *Henderson*, 138 Mass. 310, and it must be governed by that decision.

The facts that the plaintiff was present when his father demanded the money of the defendant, and himself carried the bicycle to the defendant's shop when it was returned to him, and that the plaintiff consented to the bringing of the action, certainly warrant the findings that the contract was avoided by the plaintiff, and that the action was properly brought. The statement of the plaintiff on the witness stand that he was then willing to stand by the contract, did not show that he had not avoided the contract, or that there was not a good cause of action.

There was no error in the finding that the bicycle was not a necessary. *Merriam* v. *Cunningham*, 11 Cush. 40. *Leonard* v. *Stott*, 108 Mass. 46. ***Exceptions overruled.***

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MARY J. NEALLEY *vs.* INHABITANTS OF BRADFORD & others.

Essex. Nov. 7, 1887. — Jan. 6, 1888. DEVENS & KNOWLTON, JJ., absent.

If a natural watercourse has its source, body, and outlet in a highway, the surveyor of highways of the town in which the highway is situated may, for the purpose of repairing the highway, change the direction of the watercourse, and convey it in an open ditch along the highway; and the fact that the ditch is dug between the centre of the highway and the land on the side, does not entitle the owner of the land, although he owns the fee to the centre of the highway, to maintain a bill in equity against the highway surveyor and the town to abate the nuisance and for damages; but his remedy is under the Pub. Sts. c. 52, §§ 15, 16.

W. ALLEN, J. This is a bill in equity for the abatement of a nuisance, praying that the defendants may be enjoined against diverting the water which flowed through a culvert across the highway on to land of the defendant Gage, and conveying it in a ditch in the highway in front of the plaintiff's land, and for damages. The defendants are the town of Bradford, the highway surveyor of the town, who opened the ditch and filled the culvert, and Gage, the owner of the land upon which the water flowed after passing through the culvert. The case was referred to a master, who reported the facts, his findings, and the evidence. The case was heard by a single justice upon exceptions to the master's report, and, by agreement, upon the report as it should stand after any changes that might be made on the exceptions, and comes up on appeal by the plaintiff from a decree dismissing the bill. We have not found it necessary to consider all the points presented, and advert to the facts only so far as they bear upon the questions decided.

The plaintiff's land lies on the southerly side of the highway, and extends about three hundred and fifty feet on the highway. Her house is on the westerly part of the land, and the easterly part is vacant. There was a ditch on the southerly side of the highway extending from the plaintiff's easterly line westerly about eighty feet. Just beyond the plaintiff's easterly line was a ditch extending southerly from the highway, from which water passed into the ditch in the highway, though the former did not open into the latter. The plaintiff's cellar drain opened

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into the ditch in the highway, about fifty feet from the easterly end of it. The land about was flat and wet, and water collected and stood in the ditch. About twenty-five feet westerly from the plaintiff's easterly line was the mouth of a culvert, which extended from the ditch to the northerly side of the highway, where it opened on land of the defendant Gage, and through which water from the ditch flowed upon Gage's land. The bottom of the culvert was higher than the bottom of the ditch, and water stood in the ditch on both sides of the mouth of the culvert, and for fifty or sixty feet westerly from it. The road in front of the plaintiff's house was higher than at the culvert, and there was no escape for the water in the ditch below the level of the culvert. The road commissioners of Bradford cut down the street in front of the plaintiff's house, established a regular descending grade from the culvert beyond the plaintiff's westerly line, underdrained the road-bed, and made a ditch or drain on the southerly side of the highway, between the road-bed and the plaintiff's line, from the westerly end of the old ditch to a point beyond the plaintiff's land, and obstructed the culvert.

This was in 1882. In 1883 the plaintiff filled up the new ditch and opened the culvert. In 1884 the highway surveyor of Bradford, acting under the direction of the selectmen of the town, opened the ditch and filled up the culvert, which is the act of which the plaintiff complains. At that time there was in front of the plaintiff's house and land, extending two hundred and twelve feet from her westerly line to a point eighty feet easterly from her house, a covered drain, most of it a stone drain twelve by fifteen inches in size, and the rest drain-pipe fifteen inches in diameter; from her easterly line, extending westerly about eighty feet, was the ditch which had been there from time immemorial, and connecting the two were the fifty or sixty feet of new ditch. Through this ditch and drain ran the water which had formerly run through the culvert, and that which had run and stood in the old ditch. The acts were all done in the repair of the highway, and were suitable and beneficial. No question is made of the authority of the road commissioners and highway surveyor to change the grade of the street. See *Callender* v. *Marsh*, 1 Pick. 418; *Burr* v. *Leicester*, 121 Mass. 241; *Sisson* v. *New Bedford*, 137 Mass. 255; *Sullivan* v.

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Fall River, 144 Mass. 579. And no question was made of their authority to divert the watercourse and carry it in front of the plaintiff's land, if it was occasioned by surface water. See *Elder* v. *Bemis*, 2 Met. 599; *Benjamin* v. *Wheeler*, 15 Gray, 486; *Flagg* v. *Worcester*, 13 Gray, 601. But the plaintiff contends that it was a natural watercourse, and that there is no authority to divert a natural watercourse for the purpose of repairing a highway. The master found that there was no natural watercourse southerly from the highway; but that one arose within the limits of the highway, on its southerly side, in the ditch easterly of the culvert that has been spoken of, and flowed into and through the culvert, and out upon land of Gage. The plaintiff excepted to the finding of the master that there was no natural watercourse south of the highway. An examination of the evidence shows that the finding was required by it. The defendants excepted to the finding that there was a natural watercourse within the limits of the highway. This exception would require careful consideration were the finding material. As we are of opinion that the officers had authority to divert the water, though of a natural watercourse as found by the master, this and some other exceptions become immaterial.

The whole authority for repairing highways was originally in the highway surveyors. St. 1786, *c.* 81. The only statutory limitation upon that authority was the provision that appears in the Pub. Sts. *c.* 52, § 12, that highway surveyors should not, without the approbation of the selectmen first had in writing, cause a watercourse occasioned by the wash of the highway to be so conveyed by the side of the way as to incommode a house, store, shop, or other building, or to obstruct a person in the prosecution of his business. This section does not make such act illegal, so that an action will lie for it, but provides a remedy in the nature of an appeal to the selectmen. *Elder* v. *Bemis*, *ubi supra*. The Rev. Sts. *c.* 24, § 7, provided that county commissioners, on an application for laying out or altering a highway, might order specific repairs, as is provided in the Pub. Sts. *c.* 49, § 16. By the St. of 1877, *c.* 58, (Pub. Sts. *c.* 52, § 3,) highway surveyors are to act under the direction of the selectmen in expending money for repairs. By the St. of 1871, *c.* 158, towns were authorized to choose road commissioners who should

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have all the authority of selectmen and highway surveyors regarding ways. See Pub. Sts. *c.* 27, § 75. The authority of the selectmen and road commissioners to order specific repairs is limited to town and private ways. Pub. Sts. *c.* 49, § 65.

Substantially the whole authority of the public over highways, as regards making repairs upon them, is vested in the highway surveyors, or the road commissioners as their substitutes, and the right of the public is the same in respect to the repair as it is in respect to the construction of a highway. That this power may be exercised to the damage of adjoining owners is recognized in the provision for compensation. Pub. Sts. *c.* 52, § 15.

In constructing and repairing a highway the public have the rights of a landowner as regards watercourses within the limits of the highway. It can make an artificial watercourse for surface water. In regard to natural streams it must have regard to rights of riparian owners upon them. It has no right to obstruct a stream so that the water will be prevented from flowing off from land of proprietors above; *Parker* v. *Lowell*, 11 Gray, 353; but it has a right to make changes in the course of a stream within the location of the highway which will not affect the rights in the stream of riparian proprietors upon it. *Rowe* v. *Granite Bridge Corporation*, 21 Pick. 344.

In the case at bar the riparian proprietors on the stream below the highway concurred in the action of the road commissioners and of the highway surveyor, so that the question whether the plaintiff could take advantage of a wrong to them is not presented. As the natural watercourse begins within the limits of the highway, there is no riparian proprietor above the highway whose rights can be affected. If it is assumed that the plaintiff owned the fee to the centre of the highway, that would give her no right to the water upon it as against the public. Any right relating to the water, as owner of the land, was taken with the land for public uses. The water in the highway was like earth and stones, so much matter to be disposed of in the manner most beneficial to the highway, the only restriction being that the rights of private property should not be infringed. There may be private property in earth and stones which happen to be upon the highway, but the only right in water running upon a highway which can conflict with the

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right of the public to appropriate it to the repair of the way is the right of riparian proprietors on a stream to the natural flow of the water. As there were no such rights involved in the case at bar, the stream was practically wholly within the limits of the highway, and the right to convey a natural stream, whose source and body and outlet are in the highway, in an artificial drain or ditch within the highway, cannot be distinguished from the right to carry surface water.

No damage was done to the plaintiff except from the inconvenience of having an open watercourse in front of her vacant land, and no other or greater damage than would be caused by a watercourse for the wash of the street, unless a greater quantity of water might increase the inconvenience. But the amount of damage done to the plaintiff's estate is immaterial. The statute provides an adequate remedy. As the acts which occasioned the damage were lawful acts, done for the purpose of repairing the way, the plaintiff must pursue the remedy provided by the statute. *Bill dismissed.*

H. Carter & B. B. Jones, for the plaintiff.

I. A. Abbott, for the defendants.

RODERICK McPHEE *vs.* FREDERICK W. LITCHFIELD & others.

Suffolk. Nov. 10, 1887. — Jan. 6, 1888. DEVENS & W. ALLEN, JJ., absent.

Under the Pub. Sts. c. 191, § 6, providing that a mechanic's lien shall be dissolved unless the person desiring to avail himself thereof files in the registry of deeds a statement including the name of the owner of the property, if known, the fact that, when ignorant of the owner's name, he sets forth in his statement that he believes A. to be the owner, does not prevent his maintaining a petition against B., who is in fact the owner.

PETITION, under the Pub. Sts. c. 191, against Frederick W. Litchfield, Catherine Broderick, and Margaret McNamara, to enforce a mechanic's lien for labor performed in the erection of a building in Chelsea.

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Trial in the Superior Court, before *Pitman*, J., who ruled that the petitioner was entitled to maintain his lien; and reported the case for the determination of this court. The facts appear in the opinion.

J. A. Maxwell, for the respondents.

T. J. Morrison, for the petitioner.

MORTON, C. J. The only objection made by the respondents to the validity of the petitioner's lien is that the certificate filed by him in the registry of deeds was insufficient. The statute provides that "the lien shall be dissolved unless the person desiring to avail himself thereof, within thirty days after he ceases to labor on or to furnish labor or materials for the building or structure, files in the registry of deeds for the county or district in which the same is situated a statement of a just and true account of the amount due him, with all just credits given; a description of the property intended to be covered by the lien, sufficiently accurate for identification; and the name of the owner or owners of such property, if known." Pub. Sts. *c.* 191, § 6.

In the case before us, the petitioner duly filed a certificate which was in all respects a compliance with the statute, unless the statement therein as to the ownership of the property was insufficient. This statement was as follows: "said lot of land being owned, to the best of my knowledge and belief, by Catherine Broderick, of said Chelsea." In fact the property was owned by the defendant McNamara, but the petitioner believed that the defendant Broderick was the owner. The statute and the decisions regard it as important that the name of the owner should be given in the certificate, if it can be done, because, otherwise, subsequent purchasers who buy upon the faith of the registry title are liable to be misled; and it has been held that, if a petitioner knows the true owner and gives a wrong name in his certificate, it avoids the certificate and he loses his lien. *Kelly* v. *Laws*, 109 Mass. 395. *Amidon* v. *Benjamin*, 128 Mass. 534.

But the statute contemplates that there may be cases where the name of the owner need not be given in the certificate. The name is to be given "if known." This implies that, if the name is not known to the petitioner, the certificate is good if it does

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not name the owner. In this case the petitioner did not know the owner, and thus it differs from *Kelly* v. *Laws*, and *Amidon* v. *Benjamin*, *ubi supra*.

This case, then, is one where the name of the owner is unknown. If the certificate had so stated, no fault could be found with it. Does the fact that the petitioner innocently states his belief that the respondent Broderick is the owner vitiate the certificate? So to hold would be to import into the statute a provision not found there. We are of opinion that this cannot be done, especially in a case like this, where the honest mistake of the petitioner has not in any way misled or injured the respondents. *Judgment accordingly.*

GRANITE NATIONAL BANK *vs.* ROBERT G. FITCH & others.

Suffolk. Nov. 10, 1887. — Jan. 6, 1888. DEVENS & W. ALLEN, JJ., absent.

If a guarantor of a promissory note makes a payment thereon, upon the agreement that the payee shall hold the note as security to him for the amount paid as well as for the balance remaining due the payee, such payment does not *pro tanto* discharge the maker of the note.

In an action against A. on a promissory note signed by A. and B., it appeared that B. sent his promissory note to the payee for the amount due, and that this note was not discounted or paid, nor accepted by the payee in discharge of the original note. *Held*, that the transaction did not amount to a payment of the original note.

CONTRACT, against R. G. Fitch, A. P. Moore, and J. E. Moore, upon a promissory note for $5000, signed by the defendants, and guaranteed by D. Alden and J. W. Bradbury. On the note was indorsed a payment of $2000. The plaintiff discontinued as to all the defendants but Fitch. Trial in the Superior Court, without a jury, before *Barker*, J., who allowed a bill of exceptions, in substance as follows:

It appeared that after the reported failure of A. P. and J. E. Moore, and the payment of the $2000 indorsed on the note, the guarantors of the note paid to the plaintiff the principal part thereof, leaving due a balance of $217.50, upon the agreement

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that the bank was to hold the note as security to the guarantors for the amount paid by them, as well as for the balance remaining due to itself.

Subsequently the defendants A. P. and J. E. Moore sent to the plaintiff bank their note for said balance of $217.50, the amount that remained due at that time on the original note, which note so sent has never been discounted or paid, in whole or in part, nor accepted by the bank in discharge of the original note.

Upon this evidence, the defendant Fitch requested the judge to rule as follows: "1. The payment made by the guarantors on the note in suit to the plaintiff bank, discharged and released the defendant Fitch from his liability on such note to the amount of said payment, and the plaintiff cannot have its action against said Fitch for such amount, notwithstanding the arrangement said to be made with the guarantors. 2. The giving of the note to the plaintiff bank by the Moores, for the balance remaining due after the payment by the guarantors, extinguished the remainder of the cause of action against the defendant Fitch, and the plaintiff can recover nothing against him in this action."

The judge declined so to rule, but ruled that the aforesaid facts constituted no defence on the part of the defendant Fitch to this action, or any part thereof, and found for the plaintiff for the full amount of its claim, with interest thereon. The defendant alleged exceptions.

Z. S. Arnold, for Fitch.

R. D. Smith & M. M. Weston, for the plaintiff.

C. ALLEN, J. The guarantors made a partial payment upon the note in suit, but it is found by the court that the payment was made upon the agreement that the payee and holder of the note should hold it as security to the guarantors for the amount paid by them, as well as for the balance remaining due to the payee. This was equivalent to an agreement that the sum paid by the guarantors should not be deemed a payment for or on account of the parties primarily liable to pay the note, but that the note should be kept alive, in order to be put in suit for the benefit of the guarantors. If they had paid the whole amount of the note, there is no doubt that they might have taken an

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indorsement to themselves, and brought suit upon it in their own names. It is not necessary to determine whether, in the absence of any express understanding, a payment in whole or in part by guarantors will have the effect to extinguish the note wholly or *pro tanto;* though this result is often broadly denied. See Story Prom. Notes, § 400; Byles on Bills, (7th Am. ed.) 173, 224, 225. But clearly, where there is an agreement that the note shall be kept alive, such payment does not discharge the makers. *Pinney* v. *McGregory*, 102 Mass. 186. *McGregory* v. *McGregory*, 107 Mass. 543. *Pacific Bank* v. *Mitchell*, 9 Met. 297, 302. *Williams* v. *James*, 15 Q. B. 498. *Jones* v. *Broadhurst*, 9 C. B. 173. *Thornton* v. *Maynard*, L. R. 10 C. P. 695.

As to the subsequent transaction, by which two of the makers sent to the holder of the note their new note for the balance remaining due beyond the amount paid by the guarantors, it is expressly found that the holder did not accept such new note in discharge of the original note; and under such circumstances, according to the well settled doctrine, the new note is not to be treated as payment. *Cotton* v. *Atlas Bank*, *ante*, 43, 45.

Exceptions overruled.

ELLEN O'SHAUGHNESSY *vs.* SUFFOLK BREWING COMPANY.

Suffolk. Nov. 14, 1887. — Jan. 6, 1888. DEVENS & W. ALLEN, JJ., absent.

A girl, eight years and one month old, while on her way to school, sat down on the curbstone of the sidewalk, with one leg under her and the other leg projecting into the street, leaned over, and began to sharpen a slate pencil. She knew that there was much driving on the street, but did not look to see whether any wagon was coming. While so sitting, she was struck by a wagon, and run over. *Held*, that the question whether she was in the exercise of due care was for the jury.

TORT, for personal injuries occasioned to the plaintiff, a girl eight years one month and a half old, by being run over by the defendant's wagon, on April 17, 1885, on East Eighth Street in South Boston.

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At the trial in the Superior Court, before *Brigham*, C. J., the plaintiff testified, that, while on her way to school, shortly before two o'clock in the afternoon, she sat down on the curbstone of the sidewalk, with her right leg under her and her left leg projecting into the street, leaned forward, and began to sharpen a slate pencil; that while so sitting she was struck in the back just above her left hip, knocked into the street, and run over by one of the hind wheels of the defendant's wagon. She further testified, on cross-examination, that she knew, when she sat down, that there were horse-car tracks in the middle of the street, on which horse cars passed both ways, and that there was a good deal of driving in the street; and that when she sat down, and while sitting there, she did not look to see if any wagons were coming.

The defendant's evidence tended to show that the plaintiff, while walking on the sidewalk, caught hold of an iron brace on the side of the defendant's wagon and between the front and hind wheels, and that, while holding on to this brace, her foot slipped, and she fell under the wagon, and was run over.

At the close of the evidence, the defendant asked the judge to rule, as matter of law, that the plaintiff could not recover, because there was no evidence that would warrant the jury in finding that the plaintiff was in the exercise of due care.

The judge declined to rule as requested; and instructed the jury that, if the plaintiff was hanging on to the wagon as it passed, and fell in consequence thereof, she could not recover; and that, if the plaintiff was sitting on the curbstone when she was struck, the question was what care might be expected of the child in view of her age and intelligence; that if she knew better than to be there, and knew that it was not a safe place, and was struck while there, she could not recover.

The jury returned a verdict for the plaintiff, in the sum of $2000; and the defendant alleged exceptions to the refusal of the judge to give the ruling requested.

M. F. Dickinson, Jr., & H. R. Bailey, for the defendant.

S. B. Allen, for the plaintiff.

C. ALLEN, J. In view of the verdict, it must now be assumed, in favor of the plaintiff, that the injury to her occurred substantially in the manner which she described; namely, that while on

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her way to school she sat down on the curbstone, in order to sharpen her pencil, with one foot in the gutter, and that the defendant's wagon came along and hit her while she was in that position. The instructions to the jury left them free to find a want of due care on her part, and were carefully guarded in all respects, unless it was the duty of the court to rule, as matter of law, that the plaintiff was not entitled to recover, because there was no evidence which would warrant the jury in finding that she was in the exercise of due care. It is to be observed, in the view which is now to be taken of the evidence, that there was no spirit of recklessness on her part, no intention to take a risk, no thought of encountering danger or hazard, and no calculation of chances; there was simply a lack of sufficient precaution. Under these circumstances, the case differs from *Messenger* v. *Dennie*, 137 Mass. 197, and 141 Mass. 335; and we think it was properly left to the jury to determine, under all the circumstances of the case, whether the plaintiff was using such care as was reasonably to be expected of her. See *Collins* v. *South Boston Railroad*, 142 Mass. 301, 314; *Mattey* v. *Whittier Machine Co.* 140 Mass. 337; *O'Connor* v. *Boston & Lowell Railroad*, 135 Mass. 352, 361; *Murley* v. *Roche*, 130 Mass. 330; *Lynch* v. *Smith*, 104 Mass. 52; *Mulligan* v. *Curtis*, 100 Mass. 512; *Bliss* v. *South Hadley*, 145 Mass. 91. *Exceptions overruled.*

JOSEPH F. WILSON *vs.* WALTER O. CROOKER.

Norfolk. Nov. 15, 1887. — Jan. 6, 1888. DEVENS & W. ALLEN, JJ., absent.

In an action by an assignee of a mortgage for the conversion of two horses, against an officer, who attached one of the horses as the property of the mortgagor on a writ in favor of one creditor, and the other horse on another writ in favor of another creditor, the demand made by the plaintiff, under the Pub. Sts. c. 161, § 75, stated that he held a mortgage for $492, then due, upon the two horses, and referred to the records of a town for further particulars, without stating when the mortgage was given, or by whom, or to whom. The mortgage purported to secure payment of a note for $650, and interest, but did not show when the note would become due, or the rate of interest. The note was payable six

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months after date, with interest at the rate of three per cent a month. The mortgage and note were made to a third person, and were assigned to the plaintiff a short time before the attachment. By an arrangement between the plaintiff and the mortgagor, a part of the mortgaged property was sold, and the proceeds applied to the payment of $25 to the plaintiff as a commission, the interest for six months in advance, and $158 upon the principal. *Held*, that the demand was insufficient.

KNOWLTON, J. The plaintiff held a mortgage covering two horses, which are alleged to have been converted by the defendant. The defendant attached them as the property of the mortgagor, one upon a writ in favor of one creditor, and the other upon another writ in favor of a different creditor. The plaintiff could protect his rights against each attachment by demanding of the defendant payment of his claim, and stating "in writing a just and true account of the debt or demand for which the property was liable to him," in accordance with the provisions of the Pub. Sts. *c.* 161, § 75.

The purpose of the statute in requiring an account is to enable the attaching creditor to know definitely what the mortgage secures. The information called for is important, not merely as fixing a sum to be paid, but also as assisting the creditor in determining whether the mortgage was made in good faith, and whether the debt, demand, or obligation will be valuable to him if he retains his attachment, and takes to himself the benefit of the mortgage, as he has a right to do. The law gives him ten days after the demand in which to decide whether he will pay the mortgage debt. The words "just and true account of the debt or demand" mean something more than a bare statement of a sum due. They call for a description of the debt or demand, such as will give the attaching creditor a reasonably full and accurate understanding of the nature and particulars of it. The account should state, not merely what amount is due, but also upon what kind of a debt it is due.

In many cases this has been held to have been sufficiently done by very general language, or by a reference to the provisions of the mortgage. No precise form is required. It is enough if the attaching creditor can know from the statement the nature and qualities of the debt or demand which the mortgage secures, and the amount that is due upon it. It has also been repeatedly held that innocent inaccuracies or errors in the

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account, resulting from accident or mistake, and which do not mislead or injuriously affect the attaching creditor, do not invalidate the demand. *Rowley* v. *Rice*, 10 Met. 7. *Hills* v. *Farrington*, 6 Allen, 80. *Folsom* v. *Clemence*, 111 Mass. 273. *Bicknell* v. *Cleverly*, 125 Mass. 164. *Robinson* v. *Sprague*, 125 Mass. 582. But no demand is sufficient which fails to give the attaching creditor such information as will enable him to act understandingly in reference to the claim.

In the case at bar, the plaintiff gave notice in his demand that he held a mortgage on the horses for $492 then due, and referred to the records of a town for further particulars, without stating when the mortgage was given, or by whom, or to whom. If the attaching creditor succeeded in finding and identifying the mortgage as recorded, it gave him little valuable information. It purported to secure payment of a note for $650 and interest, but it did not show when the note would become due, or what rate of interest it bore. The case finds, that the note was payable six months after date, with interest monthly at the rate of thirty-six per cent per annum; that it was made to one Reynolds, and with the mortgage was by him transferred to the plaintiff a short time before the attachment; and that by an arrangement between the plaintiff and the mortgagor a part of the mortgaged property had been sold, and the proceeds applied to the payment, first, of $25 to the plaintiff for his trouble and as a commission, secondly, of interest upon the note for six months in advance, and thirdly, of $158 upon the principal. From reading together the plaintiff's demand and the mortgage, the creditor would naturally have inferred that the note of $650, payable at some unknown time, and running at an unknown but presumably common rate of interest, had been reduced by payment to $492, and that it was a valid debt for that amount, bearing interest until maturity. He would not have suspected that the rate of interest was exorbitant, or that a large part of the mortgaged property had been applied to the payment of a commission to the plaintiff, and of interest for a period extending nearly five months beyond the time of the demand. And it can hardly be doubted, that, if these matters of which he was ignorant had been disclosed, he would have carefully considered them in determining his course.

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The plaintiff's demand, with all the aid to be derived from a mortgage which did not fully describe the note, gave the defendant no sufficient account of the nature of the mortgage debt as it then existed. It was misleading even as to the amount secured. For the sum which it stated to be due was not payable for nearly five months, and the interest for that period had been paid in advance. It was not therefore a "just and true account of the debt or demand," within the meaning of the statute, and the other defences set up at the trial need not be considered.

Defendant's exceptions sustained.

J. L. Eldridge, for the defendant.

J. E. Tirrell, for the plaintiff.

William W. Brooks *vs.* Mattie Brooks.

Norfolk. Nov. 15, 1887. — Jan. 6, 1888. Devens & W. Allen, JJ., absent.

On the hearing of a libel for divorce on the ground of adultery committed with a certain person, evidence of sexual intercourse by the libellee with that person on the morning of her marriage to the libellant, and evidence of acts of familiarity shortly before the marriage, are admissible to show the nature of the intercourse between them shortly after the marriage, when the adultery was alleged to have been committed.

Libel for divorce, filed April 15, 1887, charging the libellee with committing adultery with Charles R. Percival, on June 15, 1886, at Boston, on June 25, 26, 27, 1886, at Revere, on June 26, 1886, at Boston, and on September 21, 1886, at Revere. The case was heard before *Field*, J., who allowed a bill of exceptions, in substance as follows:

The libellant offered evidence that sexual intercourse was had by the libellee with said Percival, at a hotel in Boston, in the forenoon of the day of the marriage, and before the marriage, which was on June 15, 1886, and also offered evidence of certain familiarities with Percival, consisting of visits by the libellee to the room of Percival in said hotel, within a short time preceding said marriage. To this evidence the libellee objected, and the judge admitted the same solely on the ground that it tended to

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prove sexual intimacy with the same person who was charged in the libel with acts of adultery with the libellee, after marriage, to support which other evidence was offered and received without objection.

The judge found, as a fact, that the libellee was guilty of adultery with Percival, after marriage. The libellee alleged exceptions to the admission of this testimony.

H. Dunham, for the libellee.

W. Gaston & T. E. Grover, for the libellant.

HOLMES, J. It is settled that evidence of indecent familiarities with the person with whom adultery is charged, and even of sexual intercourse with him, at other times after marriage, is admissible to explain the character of ambiguous conduct relied on as evidence of the act of adultery in issue. *Thayer* v. *Thayer*, 101 Mass. 111. *Commonwealth* v. *Nichols*, 114 Mass. 285. *Commonwealth* v. *Merriam*, 14 Pick. 518. There can be no doubt that evidence of sexual intercourse on the morning of the marriage, and of acts of familiarity shortly before, tends in like manner to explain doubtful conduct shortly after it. The objections based on the general rules of evidence are answered by *Thayer* v. *Thayer*. It is said that marriage operates as an oblivion of all that is passed. But there is no reason for making of this rule a veil of fiction which prevents the facts from throwing their natural light on subsequent events. See *Weatherley* v. *Weatherley*, 1 Spinks 193, 196; *Van Epps* v. *Van Epps*, 6 Barb. 320. *Exceptions overruled.*

COMMONWEALTH *vs.* FRANCIS J. McCARTHY.

Middlesex. Nov. 22, 1887. — Jan. 6, 1888. DEVENS & W. ALLEN, JJ., absent.

An allegation in an indictment that the defendant "wilfully did throw a certain missile, to wit, a stone," at a street-railway car, is not sustained by proof that he threw only a billet of wood.

W. ALLEN, J. This is a complaint under § 206 of the Pub. Sts. *c.* 112, which provides that "Whoever wilfully throws or

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shoots a missile at a . . . . street-railway car," shall be punished, &c. The complaint alleges that the defendant "wilfully did throw a certain missile, to wit, a stone," at a street-railway car. The evidence tended to prove that the defendant threw a billet of wood at a car, but there was no evidence that he threw a stone. The exception is to the refusal of the court to rule that there was a variance between the allegation and the proof.

The allegation is that the defendant threw a stone. The words "to wit, a stone," limit the general meaning of the word "missile" and are descriptive of it, and the whole shows that the only missile which the defendant was charged with throwing was a stone. Even if these words are unnecessary, they are material, and cannot be rejected, because they are descriptive of the identity of what is essential to the offence. Some description of the thing thrown is essential, and the description in the complaint is material, and must be proved as laid. *Commonwealth* v. *Wellington*, 7 Allen, 299. *Commonwealth* v. *Hartwell*, 128 Mass. 415. *Commonwealth* v. *Moore*, 130 Mass. 45. *Commonwealth* v. *Luscomb*, 130 Mass. 42. *Commonwealth* v. *Tobias*, 141 Mass. 129. 1 Greenl. Ev. § 65.

The rule, that, when an allegation is not descriptive of an offence charged, but a statement of the manner in which it was committed, it is sufficient to prove the substance of it, as when, in an indictment for murder, the death is alleged to have been caused by a blow with a stone, proof that it was caused by a blow with a stick is sufficient, does not apply to this case. Here the offence consists in throwing a missile, and words describing the missile are descriptive of the offence, and must be strictly proved. We think that the allegation that the missile thrown was a stone was not sustained by proof that it was a billet of wood. *Exceptions sustained.*

H. H. Winslow, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

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ALEXANDER McKENZIE *vs.* MARIAH ASHLEY & others.

Hampden. Sept. 28, 1887. — Jan. 7, 1888. C. ALLEN & HOLMES, JJ., absent.

A testator bequeathed to his wife, in lieu of dower, the income for life of the residue of his estate after the payment of two legacies to herself, and also so much of the principal as should be necessary to give her "a good and comfortable support." With $1100 of her own money, and $2500 paid her from the principal of the trust fund, which was paid to her with the consent of the remainderman, she purchased a house, in which she lived for several years on the income received from her husband's estate. Subsequently, the income became insufficient for her support, and she requested that another part of the principal be paid to her. *Held*, that she was not obliged to dispose of her house and use the proceeds thereof for her support, before her request could be granted.

BILL IN EQUITY by the executor of the will of Josiah D. Ashley, alleging that said Ashley died on January 20, 1871, leaving a will, which contained the following clauses:

"To my beloved wife, Mariah Ashley, I give and bequeath all my household furniture and wearing apparel.

"I further give and bequeath to my beloved wife, Mariah, the sum of seven hundred dollars.

"To my beloved wife, Mariah, I further give and bequeath the use of all the rest and residue of my estate during her natural life; but, should the use of my estate not be sufficient to give her a good and comfortable support, then it is my will that she use so much of the principal as shall be necessary to give her a good and comfortable living during her lifetime; this in lieu of dower, subject, however, to the payment of my just debts and funeral expenses.

"I give and bequeath one hundred dollars to Frederic Alderman, son of Nelson Alderman, out of that part of my estate made subject to my wife's use, to be paid after her decease.

"I give and bequeath to Joseph B. Hascall all of that portion of my estate not before disposed of, made subject to my wife's use, that shall remain unexpended at her decease."

The bill further alleged that the estate of the testator consisted mostly of real estate, which was sold for the payment of debts, under a license from the Probate Court; that the proceeds, after payment of liabilities, had been invested by the

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plaintiff, and the income paid to the widow of the testator, as provided in the will; that on May 20, 1871, Joseph B. Hascall, the remainderman, executed an instrument in writing, by the terms of which he agreed that the plaintiff might appropriate from the principal the sum of $2500 "for the comfort and the comfortable support" of the widow of the testator; that said sum was so appropriated, and was duly allowed by the Probate Court in the plaintiff's account as executor; and that since said payment other sums had been paid to the widow out of the principal, and had been accounted for and allowed in the Probate Court.

The bill further alleged, that the widow contended that the income of the estate was not sufficient to give her a good and comfortable support.

The prayer of the bill was that the plaintiff be instructed as to the proper execution of his said trust.

The case was heard by *Holmes*, J., who reported it for the consideration of the full court, in substance as follows:

It was admitted that the income of the fund now in the plaintiff's hands was not sufficient to give the widow "a good and comfortable support," but the representatives of Joseph Hascall, the remainderman, who is now deceased, rely upon the fact, also admitted, that on May 20, 1871, the sum of $2500 was appropriated to the widow's use, by the consent of said Hascall, and that this sum was used by the widow, in the purchase of a house, which she now occupies. This sum has not been exhausted upon her support, otherwise than as above set forth.

It was further agreed, that at the testator's death, and at the time of the widow's receipt of said sum of $2500, the income of the fund applicable to her support was $600, and that the income was sufficient for her support for some years after the receipt of said sum. It was proved, subject to the question of the admissibility of the evidence, that Hascall intended that the widow should purchase a house, and expressed his approval of this purchase, in a conversation before the instrument was made by him; that the widow is now seventy-seven years old and partially paralyzed, and thought at the time of the purchase that she could be more comfortable in a house of her own,

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which she had always been accustomed to, than she would be in hired lodgings. She was in the ordinary health of people of her age at the time of the purchase. The house purchased was of the same class that she had previously lived in with her husband. At the time of the purchase, the rent of the house was $15 or $16 a month. It cost $3600, but it is now worth about $1800.

H. B. Stevens, for the widow.

E. B. Maynard & C. C. Spellman, for the representatives of Hascall.

KNOWLTON, J. The defendant Mariah Ashley was entitled, under the will of her husband, to the income for life of the residue of his estate after the payment of two legacies to herself, and also to so much of the principal as should be necessary to give her a good and comfortable support. After her death, Frederic Alderman, one of the defendants, is to be paid $100 from what is left, and the remainder is to be given to the representatives of Joseph B. Hascall, a legatee who has deceased since the death of the testator. The income is now insufficient for the support of Mariah Ashley, and the plaintiff should provide for her from the principal, unless the whole or a part of $2500, paid her in 1871, is first to be used for that purpose. With this sum paid her, and with $1100 of her own money, she bought at that time a house for her home, and has occupied it ever since. The only question in the case is whether she must dispose of that house, or of some interest in it, and use the proceeds, before she can receive anything more from the principal of her husband's estate.

The words in the will, "a good and comfortable support," and "good and comfortable living," are to be construed liberally. She is the testator's widow, and this provision is in lieu of dower. Moreover, the facts that no one else was to receive anything under the will until after her death, and that the entire estate was set apart by the testator for her use if she should need it, indicate an intention on his part that she should be well supported.

The house which she bought was of the same class that she had previously lived in with her husband, and would rent for fifteen or sixteen dollars per month. She was well advanced in years, and had always been accustomed to living in a house of

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her own. When the payment of $2500 was made, the income of the fund was sufficient for her support, and continued to be for some years afterward. This payment was accounted for and allowed in the Probate Court, with full knowledge, on the part of those interested, of the use to which it was put, and it has apparently never been objected to. Indeed, Joseph B. Hascall, who, as residuary legatee, was the only person interested against it, — except in the remote contingency of the fund being so far consumed as to affect the legacy of $100 to Frederic Alderman, — consented in writing to the payment, well knowing that the money was to be used in the purchase of this house. In the light of these facts, we cannot doubt that the procurement of a house to be used as a home for Mariah Ashley was reasonably necessary, and that the cost of it was properly chargeable to the fund for her support.

If the $2500 had been exhausted in procuring such a home for her lifetime, the case would be free from difficulty. But she obtained an estate in fee, and after her death this house will pass under her will or descend to her heirs. To have kept strictly within the purpose for which the money was to be appropriated under the will, she should have applied it to the purchase of an estate for her personal occupation during her life, and, if it became necessary to acquire the whole title, the remainder should have been held for the benefit of the fund. Instead of making a strict appropriation of the payment with a view to the preservation of the legal rights of all parties, she put $1100 of her own money with it, and bought the house, and took an estate in fee to herself. The property has diminished in value and is now worth but $1800. Eleven thirty-sixths of that sum represent a payment from her own money, and twenty-five thirty-sixths a payment from the principal of the fund. The use too of the contribution from her own property has apparently gone in diminution of the sum which the fund would otherwise have been required to supply. Does her holding a title in fee, instead of for life, in this share, preclude her from claiming support until she shall have disposed of the remainder, and consumed the proceeds?

Her purchase was made at a time when it was not expected that this question could ever arise. The income was then ample

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for her wants, and continued to be for several years. It is fair to suppose that she acted in good faith, and that all parties interested consented to her action. The payment having been made to her absolutely, as needed for her support, with the consent of the only one interested, she might apply it as she chose, without accounting for any part of it, if the income should continue to be sufficient for her wants. It was only in the unexpected event of her needing more of the principal, that her disposition of it would become material. Moreover, there may have been practical objections to complicating the title with a division of it into different estates. There is nothing to indicate that any one suggested taking the title differently at the time of the purchase. On the contrary, the approval of the account in the Probate Court, and the payment to her of portions of the principal from time to time afterward, all of which have been accounted for and allowed, indicate that all parties interested have treated this purchase as a final disposition of the $2500 in accordance with the provisions of the will. If the money had been paid her for her support, and she had lost it, it would hardly have been contended that she could not afterward, if needy, have resorted to the fund for relief. All she received was used more than sixteen years ago. Most of it was properly applied to a use contemplated by the will, — the procurement for her of a home for life. The remaining part, which represents the excess of value of the estate after her death above the contribution from her money, was so paid out and used in connection with the first, as to be difficult of separation from it. And this was done, as we infer, under an implied agreement of all parties to consider it a payment authorized by the will.

We do not think, under the circumstances of this case, that Mariah Ashley's ownership of an estate in the house which will extend beyond her lifetime is such a possession of property received from the plaintiff as to require her to dispose of it and apply the proceeds to her support, or render it necessary that a transaction so long assented to should be now disturbed. The plaintiff may therefore properly pay her, under the will, such sums, in addition to the income, as she may need for her comfortable support. *Decree accordingly.*

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HENRY G. TOWNE *vs.* SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

Hampden. Sept. 27, 1887. — Jan. 7, 1888. C. ALLEN & HOLMES, JJ., absent.

In an action on a policy of insurance against loss by fire, an overestimate of the value of the property lost in the proof of loss, if not made fraudulently, will not avoid the policy, or render the proof of loss insufficient to satisfy a condition in the policy requiring the insured to render a statement of his loss in writing.

If a policy of insurance against loss by fire requires that, in case of loss, the insured shall make a statement in writing, "setting forth the value of the property insured," the property insured need not be set forth in detail.

A provision in a policy of insurance against loss by fire, that all other insurance on the property insured shall be set forth in detail in the proof of loss, is complied with by inserting in such proof a copy of the description contained in another policy of insurance on the same property.

If goods in two buildings are insured, in separate amounts, against loss by fire, by a policy providing that the insured, in case of loss, shall make a statement in writing, setting forth the value of the property insured, and the purposes for which and the persons by whom the building containing the property insured was used, a statement in which the insured claims payment for all the property insured, but in which he refers to one of the buildings only, is insufficient.

CONTRACT, upon a policy of insurance in the form prescribed by the Pub. Sts. *c.* 119, § 139, against loss by fire upon stock in trade and furniture in a building in Hardwick. The case was referred to a referee, who made an award in favor of the plaintiff, which award was returned to and accepted by the Superior Court, and judgment entered thereon. The defendant appealed to this court. The facts appear in the opinion.

C. A. Brine, for the defendant.

C. L. Gardner, for the plaintiff.

FIELD, J. The referee overruled the objections of the defendant to the admission of the proof of loss as evidence, having found that the "plaintiff did not wilfully swear falsely in his said proof," and ruled that it "was sufficient," and this is the question of law raised by this appeal. The plaintiff inserted at the end of the proof of loss a statement that "any other information that may be required will be furnished on call, and considered a portion of these proofs," but it does not distinctly appear that any other information was called for. The proof of loss contains

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the provisions of the policy describing the subject of the insurance, and the corresponding provisions of another policy taken out by the plaintiff in another company, — other insurance being permitted; and it purports to give the "actual cash value of each specific subject thus situated and insured under the aforesaid policies at the time of loss, and the actual loss and damage by said fire on the same, and for which claim is hereby made;" by which it appears that, except articles of the estimated value of $13.66, the claim was for a total loss. For a more particular statement the proof refers to a schedule annexed. This schedule contains in its first clause, "Stock and fixtures in Hardwick store, as per account taken, $6135," and then follow a few small items of goods bought and sold, and of goods saved, making the whole loss $5862.92. The referee has found that the goods were totally consumed by fire, "excepting about $13.66 worth."

The objections taken to this proof are, that it was fraudulently false in the amount stated, did not specify in which of the two buildings mentioned in the policy the goods insured were, or the amount destroyed in either, and did not give any quantities or items in detail; and that, as there was other insurance on the property, not concurrent, the extent of the claim on the defendant did not appear by the proof. The referee has found as a fact, that the proof was not fraudulently false in the amount stated; and this disposes of the first objection. The policy provides that it shall be void "if the insured shall make any attempt to defraud the company, either before or after the loss;" but overestimates of value in the proof of loss, which are not fraudulently made, do not avoid the policy, or make a proof of loss insufficient to satisfy the condition precedent of the policy, that the insured shall render a statement of his loss in writing before the company shall be liable to pay the amount insured. *Little* v. *Phœnix Ins. Co.* 123 Mass. 380, 385.

The policy was the Massachusetts standard policy, and it provided that, "In case of loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon in detail, the purposes for which and the persons by whom the building insured, or containing the

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property insured, was used, and the time at which and the manner in which the fire originated, so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same."

The defendant insured $1800 on the plaintiff's stock of goods in two-story frame dwelling and store building; $100 on his furniture and fixtures therein; and "$200 on his goods stored in old store situate five feet north of new store." The referee finds that the principal building was wholly occupied by the plaintiff as a store and dwelling, and that ten feet from this building was an old store building, formerly used by the plaintiff as a store, the upper part of which was occupied by an undertaker, but in the basement of which, as the plaintiff testified, was "about $300 worth of the plaintiff's goods," which were totally consumed. The proof of loss states that "the building insured, or containing the property destroyed or damaged, was occupied in its several parts . . . . by Henry G. Towne for store and dwelling." The policy does not in terms require a statement of the value of the property insured in detail, or a particular statement of the value of the property; and if it be conceded that from the nature of insurance, and from the provision that the company "shall either pay the amount for which it shall be liable, or replace the property with other of the same kind and goodness," the company could properly require a statement in detail of a stock of goods, if the plaintiff could reasonably furnish such a statement; still, a neglect or refusal to furnish a detailed statement would not of itself defeat the plaintiff's claim, or make the proof of loss insufficient; at most, it would only be evidence of an attempt to defraud the company. It is not found that the plaintiff refused to permit an examination of his books and vouchers, or that his books and vouchers were not all consumed by the fire, or that the plaintiff could have submitted a more specific statement of his loss, or that the plaintiff fraudulently withheld any information or attempted to defraud the company. The objection, that the proof does not give quantities or values in detail, cannot avail the defendant. *Harkins* v. *Quincy Ins. Co.* 16 Gray, 591. *Wyman* v. *People's Ins. Co.* 1 Allen, 301. *Fowle* v. *Springfield Ins. Co.* 122 Mass. 191, 196. *Clement* v. *British American Assurance Co.* 141 Mass. 298, 301.

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Catlin v. *Springfield Ins. Co.* 1 Sumner, 434. *McLaughlin* v. *Washington County Ins. Co.* 23 Wend. 525. *Norton* v. *Rensselaer Ins. Co.* 7 Cowen, 645. *Bumstead* v. *Dividend Ins. Co.* 2 Kern. 81. *O'Conner* v. *Hartford Ins. Co.* 31 Wis. 160.

As the plaintiff set out in his proof an exact copy of the description of the property insured by the other policy which he had obtained, he complied with the requirement that the statement of loss should set forth "all other insurance thereon in detail." If there was any difficulty in applying the two policies to the loss, it was occasioned by the want of particularity in describing the goods lost, and the buildings in which they were when the fire occurred.

The most formidable objection is, that the proof of loss did not distinguish between the goods in the principal store, and the goods in the "old store." From the statement in the proof of loss, with the schedule annexed, it appears with reasonable certainty that the plaintiff made claim for a loss of his whole stock and fixtures "in Hardwick store," excepting goods saved of the value of $13.66, and that these were situated and insured as expressed in the policy; and from the policy it appears that the old store was used as a place of storage for goods belonging to the stock which was kept for sale in the new store. But in the description which is contained in the proof of loss of the building "containing the property insured," there is no reference to the old store, and the statement of "the purposes for which and the persons by whom" the building was used indicates that the plaintiff had in mind only the new store. As the award is for $1924.22, with interest from November 1, 1883, it is plain that the referee must have awarded something for the loss of goods in the old store, because the insurance on property situated elsewhere amounts to only $1900, and the date of November 1 is probably taken as the time when interest would begin to run, being about sixty days from the time when the proof of loss was submitted.

By the policy, the goods in the old store were made a distinct subject of insurance, and these goods were not covered by the other insurance. The defendant, therefore, had an interest in knowing the amount of the damage to the goods in the old store.

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We think that the old store must be considered as a building distinct from the new store, and that the proof of loss should have contained a statement of the amount of the damage to the goods in the old store, and the purposes for which and the persons by whom this building was used, and that this has not been done. This particular defect concerns only the insurance upon the goods in the old store, and may not have been seasonably called to the attention of the plaintiff, and the defendant's conduct may have been such as to constitute a waiver, or may estop it from making this objection; but there are no facts found by the referee from which such inferences can be drawn as matter of law, and the referee has found generally that the defendant has not waived its right to have such a proof of loss as is required by law.

For this reason the judgment must be reversed, and the report recommitted to the referee. See *Cumberland* v. *North-Yarmouth*, 4 Greenl. 459. *So ordered.*

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SUPPLEMENT.

Opinion of the Justices to the Governor and Council.

Under the St. of 1887, *c.* 437, persons who served in the army or navy of the United States in the time of the war of the Rebellion, and were honorably discharged therefrom, cannot be preferred for appointment to office or employment in the service of the Commonwealth or the cities thereof, without having made application for appointment to office or employment to the civil service commissioners, as required by the St. of 1884, *c.* 320, and the rules of the civil service commissioners made thereunder.

The following order was passed by the Governor and Council on July 20, 1887, and transmitted on the following day to the Justices of the Supreme Judicial Court, who on September 22, 1887, returned the answer which is subjoined.

Whereas, the civil service commissioners have prepared and submitted to the Governor and Council for approval, pursuant to section 2 of chapter 320 of the Acts of the Legislature for 1884, the following additional Civil Service Rule:

"Amendment of Rules.

"Clause 1. Any person who served in the army or navy of the United States in the time of the war of the Rebellion, and was honorably discharged therefrom, desiring, under chapter 437 of the Acts of 1887, appointment to office or employment in positions classified under the civil service rules, without having passed any examination provided for therein, shall file an application for such appointment, stating on oath, — 1. His name, residence, and post-office address. 2. The office or employment he seeks. 3. The time of service in the army or navy; the regiment and company in which, or the vessel on which, such service was rendered; and the date of his discharge. 4. Whether the applicant habitually uses intoxicating beverages to excess, or is a vender of intoxicating liquor. 5. Whether

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he has within one year been convicted of any offence against the laws of the Commonwealth. 6. That he desires appointment or employment without having passed the examination provided for by the civil service rules.

"Such application shall be accompanied by certificates of good moral character and capacity for performance of the duties of the office or employment.

"Such application, if for an office or employment in the service of the Commonwealth, or the city of Boston, shall be filed in the office of the commissioners; if for an office or employment in the service of any other city than Boston, it shall be filed with the civil service examiners for such city. Such applicant, if he expresses a desire not to pass the examination provided for by the civil service rules, shall be exempt therefrom.

"Clause 2. When requisition is made by an appointing officer upon the commissioners for names of eligible persons for appointment to office or employment in the public service, the commissioners shall certify the names of those most eligible on the proper register, as provided for by the civil service rules, and in addition shall, when so requested by the appointing officer, report the names of any honorably discharged soldiers or sailors of the war of the Rebellion, who have filed proper and true applications for appointment to such office without examination. The appointing officer can appoint from the list of names so certified or reported to him."

And whereas, the question of the approval of said civil service rule is now before the Governor and Council, and they wish to be advised as to its legality under chapter 437, of the Acts of the Legislature for 1887,

It is therefore ordered that the opinion of the Justices of the Supreme Judicial Court be required upon the following important questions of law:

First. Under chapter 437 of the Acts of the Legislature of 1887, can persons who served in the army or navy of the United States in the time of the Rebellion, and were honorably discharged therefrom, be preferred for appointment to office or employment in the service of the Commonwealth, or the cities thereof, without having made application for appointment to

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office or employment to the civil service commissioners, as required by chapter 320 of the Acts of the Legislature for 1884, and the rules of the civil service commissioners made thereunder?

Second. Will the proposed civil service rule, set forth as above, if approved by the Governor and Council, be valid?

To His Excellency the Governor and the Honorable Council of the Commonwealth of Massaschusetts:

The undersigned, Justices of the Supreme Judicial Court, having considered the questions upon which their opinion is required by the Governor and Council, respectfully submit the following opinion:

The statute of 1887, chapter 437, provides that "all persons who served in the army or navy of the United States in the time of the war of the Rebellion, and were honorably discharged therefrom, may be preferred for appointment to office or employment in the service of the Commonwealth, or the cities thereof, without having passed any examination provided for by chapter three hundred and twenty of the Acts of the year eighteen hundred and eighty-four, or by the rules of the civil service commission made under the provisions of said act. Age, loss of limb, or other physical impairment, which shall not in fact incapacitate, shall not be deemed cause to disqualify under this act. But nothing herein contained shall be construed to prevent such persons from making application for such examination, or from taking such examination, provided they were entitled to do so under the rules of said commission."

It seems to us that this statute was intended to be an amendment of the statute of 1884, chapter 320, usually called the civil service law, the main purpose being to exempt honorably discharged soldiers and sailors from the examination required by that law and the rules established under it, leaving them subject to the operation of the law except so far as exempted by the amending act. This is the natural and obvious meaning of the act of 1887. If the Legislature had intended to provide that soldiers and sailors should be exempted from the operation of the civil service law, it is to be presumed that it would have said so in direct and explicit language, as is done in the fifteenth section of the act of 1884, where it is provided that

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certain classes of officers "shall not be affected, as to their election or selection, by any of the rules made as aforesaid."

The statute of 1887 does not provide that soldiers and sailors may be appointed to office or employment without making application to the civil service commissioners. On the contrary, the structure of the act shows that it was intended to be engrafted upon and to become a part of the act of 1884, for the regulation of the civil service. The language used is, "may be preferred for appointment to office or employment," which implies that they are to be selected out of a list or number of applicants, and plainly refers to the fourteenth section of the civil service law, providing for giving preference to soldiers and sailors.

The provision that "age, loss of limb, or other physical impairment, which shall not in fact incapacitate, shall not be deemed cause to disqualify under this act," implies that soldiers and sailors were to remain subject to the civil service law, except so far as expressly exempted by this act. This provision would be entirely useless if the purpose of the preceding clause was to take the appointment of soldiers and sailors out of the jurisdiction and supervision of the commissioners. Considered as a part of the civil service law it has force and effect, because it exempts soldiers and sailors from the operation of the rules of the commissioners, making in certain cases the age of the applicant a disqualification, and limits the power of the commissioners to make any rules, in the future, which are inconsistent with it.

The civil service law made a radical change in the method of appointing such officers and servants as are within its scope. Its scheme is that all such appointments should be under the supervision of the civil service commissioners, who are to determine the qualifications of the applicants for the offices or employment which they seek. The statute does not attempt to fully define the qualifications of such officers and servants, but it confers upon the commissioners the authority to make rules, not inconsistent with law, for their selection and appointment, which rules, when approved by the Governor and Council, have the force of laws, and are binding upon the appointing officers.

The statute and the rules made under it establish certain requirements or conditions, which must be complied with before

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an appointment will be made. Thus, among other things, it is required that an application must be made to the civil service commissioners, stating certain facts as to the name, age, residence, and previous history of the applicant; it is also provided that no person shall be appointed who is a vender of intoxicating liquor, or who habitually uses intoxicating beverages to excess, or who within one year preceding his application has been convicted of any offence against the laws of this Commonwealth, and that certain officers shall be appointed for a probationary period. The rules, following the directions of the statute, further make specific and minute provisions for the personal examination of the applicant, designed as a test of his attainments and proficiency in the department of knowledge deemed necessary for his fitness for the position which he seeks.

The examination of the applicant is an important requirement of the statute, and of the rules, but it is not the only material requirement. It cannot justly be said that the other requirements to which we have referred are parts or incidents of the examination. They are separate and independent requirements or conditions, and are so treated throughout the statute and the rules. The Legislature, in enacting the statute of 1887, had in mind the civil service law and the rules of the commissioners; the provision that soldiers and sailors "may be preferred for appointment to office or employment in the service of the Commonwealth, or the cities thereof, without having passed any examination provided for" by such law and rules, according to the natural import of the words used, refers to the personal examination provided for by the statute and rules. It cannot be held to repeal the statute of 1884 so far as it relates to soldiers and sailors, or to exempt them from the other requirements of the statute and rules, without greatly enlarging the language of the Legislature.

We are therefore of opinion, in answer to the first question proposed, that, under chapter 437 of the Acts of the Legislature of 1887, persons who served in the army or navy of the United States in the time of the Rebellion, and were honorably discharged therefrom, cannot be preferred for appointment to office or employment in the service of the Commonwealth, or the cities thereof, without having made application for appointment to

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office or employment to the civil service commissioners, as required by chapter 320 of the Acts of the Legislature of 1884 and the rules of the civil service commissioners made thereunder.

The second question is general, and points out no particular question of law upon which our opinion is desired.

We have doubts whether, within the fair intent of the Constitution, the executive or legislative departments can submit to the Justices a law, or a series of laws or rules more or less complicated, and ask them to examine and ascertain what questions can be raised as to the validity of every clause, and to express an opinion in advance upon every such question. The practice always has been for the Justices to confine their answer to the particular questions of law submitted to them. As the order of the Governor and Council points out no definite question except the one we have answered, we have considered no other. If we were to suggest questions which might arise as to the validity of parts of the rule proposed by the commissioners, and to express an opinion upon them, it would be going beyond our proper duty, and might be regarded as an interference with the independence of the executive department.

Mr. Justice Devens does not concur in this opinion, and requests us to state that in his view the statute of 1887, chapter 437, in providing that the soldiers and sailors therein described may be preferred for appointment without having passed any examination provided for by the civil service act, or the rules of the civil service commissioners made under the provisions of said act, exempts them from any investigation by the civil service commissioners of their qualifications, and leaves them to be determined by the power competent to appoint, and that they are thus necessarily exempted from making application for appointment to the civil service commissioners.

MARCUS MORTON.
WALBRIDGE A. FIELD.
WILLIAM ALLEN.
CHARLES ALLEN.
OLIVER WENDELL HOLMES, JR.
MARCUS P. KNOWLTON.

Boston, September 22, 1887.

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THE Honorable AUGUSTUS LORD SOULE, a Justice of this Court from the twenty-seventh day of March, 1877, to the eleventh day of April, 1881, died at Franconia, New Hampshire, on the twenty-fifth day of August, 1887. A meeting of the members of the Hampden Bar was held in Springfield on the twenty-second day of the following September, at which the following resolutions were passed, which were presented to the full court on the twenty-seventh day of the same month.

Resolved, That in the death of the Honorable Augustus L. Soule, a former member of this bar, and an ex-Associate Justice of this Court, the bar and the community suffer the loss of an excellent, eminent, and honorable practitioner; a just, generous, and upright man; one who dignified and adorned each and every station he was called to occupy; who illustrated the practice of his profession with fairness, courtesy, and grace; who evaded the littlenesses of law and of life. Jealous of the honor of the profession, he believed in the maintenance of its amenities as well as its dignities. A quiet, steadfast, and reliable friend, allegiance to the right was his characteristic. An honorable citizen, an accomplished lawyer, a dignified, courteous, able, and upright judge, his memory remains to us an inheritance and an example.

Resolved, That these resolutions be presented to the Honorable the Supreme Judicial Court, that they may be placed upon record, and a copy thereof be transmitted by the clerk to the family of Mr. Soule, in token of our earnest sympathy with them in their loss.

Edward H. Lathrop, Esq., in presenting the resolutions, addressed the court as follows:

These resolutions typify and illustrate in a measure, perhaps, the feelings of the bar toward Mr. Soule, — this bar where he started out in his profession, and where he had fought his way upward to a highly successful and honorable practice. Few men knew Mr. Soule as we did. The revelation of himself to the multitude was rare. Conscious of his own strength and limitations,

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there yet was always in him a desire to be of and among the people. He made little noise in his career up to where he attained the distinction of yourselves. It is true, perhaps, that contact with other and jury tribunals was not to his taste. The chosen arena of his efforts was before the bar of this court. He loved the seclusion and dignity and strength of the Supreme Court. He was a constant and appreciative friend and man. His desire and enthusiasm for the advancement of the younger members of the bar was ever quietly, watchfully manifested; for he knew well what it was to struggle for professional existence. Always, in the office and as a citizen, did he identify himself with the advancement of the people's interests. I need not enlarge upon his personal characteristics. You know them well. It only remains for me to move that these resolutions be made a part of the record of this court.

The Hon. George M. Stearns then addressed the court as follows:

The death of one who for nearly forty years was a member of this bar, who represented this city in the Legislature of the State, and who was an Associate Justice of this court, appears a proper occasion for us to ask your Honors to pause in the transaction of the business of this court, and to join with us in an affectionate tribute of respect to Mr. Soule.

As I look about me, I see no one whose recollections of Brother Soule were earlier than mine. When I was a student in the office of the late Mr. Justice Wells of Chicopee, coming there in 1848, Mr. Soule became a student in the office of George Walker. Our offices were but a few steps apart. I soon became an intimate acquaintance of his, and enjoyed the freedom and frankness which the companionship of youth affords. He was then a witty, a genial, and a most confidential companion and friend; and although generally deemed to be haughty and almost defiant in manner, I have never met any one who more readily laid bare his bosom, or more fully exposed his emotions and purposes to those in whom he trusted and confided.

As a lawyer, I think he presents a most wonderful phase of our profession. He was keen, peering, incisive, thorough in detail, searching, and able. He had the most wonderful agility, it

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always seemed to me, for it was my lot to meet him in the vehement combats which we professional men enter upon so often as much as any other man. I was always surprised with the alertness of the man. No case was so strong that we felt sure it was safe, when Brother Soule was on the other side. If we rushed on him with a case apparently invincible, he stepped aside and gave us a wound as we swept by. I recollect well the first case we ever had, and I speak of it as illustrating somewhat his ability and the character of the man. We were both of us students, and both of us ambitious to try cases, — an ambition of which most of us of my age have been happily cured. I brought a case before George Walker. Lawyers then brought cases before one another as justices of the peace. I supposed there was no defence. To my surprise, when I went over to Mr. Walker's office to ask for an execution, he told me Mr. Soule had appeared and filed a plea in abatement. I examined the papers in the case, and found there a plea in abatement drawn out in faultless form, with the summons duly enrolled. The point was that the summons was dated in June, and was returnable on the 13th day of July, and did not express what July, the word "next" having been omitted in the haste of writing. We argued the case before Mr. Walker, Brother Soule arguing that it was necessary that it should appear certainly what July was meant, as the writ must be returnable within sixty days from its date, and it was not legally certain that this writ was so returnable. Mr. Walker decided to sustain the plea, and ordered the suit abated. I was mildly enraged at the decision, as I have been sometimes since at the decisions of other tribunals. I appealed, but before the case came to trial Brother Soule became satisfied that the broader principles of our jurisprudence would not sustain this New Hampshire technicality.

He was a powerful antagonist. As I have said, we never knew when we were safe, and never until the jury were locked up were we quite certain that we knew the worst. He exhausted his adversary's case by tapping the veins over the body of it, rather than by any brutal assault upon the jugular, or any savage cuts of the femoral arteries. He did not like a jury trial, and a jury trial did not like him. He could not get down to the jury. He had not the knack of sitting on the milking-stool

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of the farmer, or of handling the oil-can with the mechanic, or of flecking himself with cotton with the mill hand, and he could not avoid his manner betraying the loftier conceptions he had of a case. Consequently, he always sought for exceptions, and most wonderfully astute and keen was he in attaining that valuable weapon, a good exception. I may truly say, in remembering the many contests I have had with him and the many remarkable questions and points which he raised that never occurred to me or any other member of the bar, that he was the Christopher Columbus of this bar in matters of law, — discovering not only legal continents, but the minute and unknown islands that dot the coast. He said to me the last time I saw him in this court-house, that he hoped he might never be obliged to try another jury case. He loved to argue cases before this court, he loved the Supreme Court and discussions before it. He said that when he was beaten here, he knew there was a reason for it.

As an office lawyer, and in the position which he occupied in later years, I think he was unsurpassed. In counsel he was clear and cool, and balanced and fair, and in the preparation of instruments, of documents, of contracts, and of bills before the Legislature, I never have met with his equal. As a judge of this court he seemed to us to be nearly perfect. He was dignified and fair, and quick and strong. As a citizen, he was honorable and noble and true; as a husband and father and as a friend, he was blameless.

The Hon. George D. Robinson then addressed the court as follows:

May it please your Honors: When I came to the bar in this county, Mr. Soule was in the full vigor and forceful exercise of his high powers of manhood. He stood out as a man of large capacity, and of varied and accurate learning. Cultured, keen, clear-sighted, frank, earnest, equipped in the learning of the profession, he impressed me as the possessor of rare natural gifts, and as a master in the difficult and abstruse questions of the law. He was at the time associated with Judge Wells, and the subsequent career of the two members of that firm, and of some whose course of professional studies they directed, by example

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as well as by precept, demonstrates the quality of greatness, of scrupulous honor, and of scholarly attainments that impressed itself into the character and standing of that office.

I am well aware that it has sometimes been said of Mr. Soule that he was cold, haughty, and distant, and that he seemed to have little sympathy with the every-day people about him. But I am sure it was only in the exterior of the man that one could discover such a characteristic. Deeper than the expression of manner, his heart was full of generosity and kindness, and one needed but to know him thoroughly and intimately to find a warm, loyal, and confiding nature, enriching and ennobling his life. I shall never forget my earliest acquaintance with him in the court-room. He was but a stranger to me. His position at the bar was assured and recognized. My effort was but the halting and uncertain struggle with questions which no experience had taught me to solve. I had made a motion in court which seemed to me so clearly just and proper, that I doubt not my countenance revealed my deep disappointment when the presiding justice, justly convinced, no doubt, by the superior wisdom and experience of my opponent, denied my application. As I turned away Mr. Soule made a jocose remark to me, and said: "Never mind, Robinson, don't let that discourage you. You 'll come out all right by and by." To a young man such encouragement and cheer are of immeasurable aid, and the older practitioner who speaks such words out of a warm and sympathetic heart has done very much to make a life of success and honor far more probable than one of misfortune and failure. And such kindliness of bearing was not exceptional with him. Others have profited again and again by the helpfulness of his suggestions, and bear unhesitating testimony to the generous qualities as well as the excellent abilities of this accomplished lawyer, this refined scholar, this courteous gentleman.

In later years we knew him as Judge Soule, a Justice of the Supreme Judicial Court of the Commonwealth. You who were his associates must have highly appreciated the maturity of power, the strength and clearness of judgment, and the unwavering sense of justice, with which he participated in the deliberations of the court. We who placed our causes before him for

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his consideration and determination were assured that he never forgot what was due from him as a man and as a judge. We never doubted that his judgments were always the result of his honest convictions. He who at the bar had waged warfare on the highest plane of professional honor, above the meanness of tricks and deception, who claimed no advantage through favoritism and won no victory by questionable practices, who could entertain no respect for any court, high or low, that was not pure and incorruptible, — he never lowered in the slightest degree the dignity and character of this honorable court, or disturbed the confidence of the people in the integrity and fairness of its judgments. Personal favor exercised no control or influence in his conclusions. He passed upon the causes, not the suitors, that came before him. He was ever actuated by the spirit of the legend of this court, *Nulli vendemus, nulli negabimus, justitiam.*

When a judge so able and upright dies, when an accomplished lawyer and gifted scholar passes beyond the vail, when the clean-handed and honorable gentleman whom we all knew, goes forever from our sight, his memory is our precious possession, and his character remains to inspire and uplift. I am sure, may it please your Honors, that the sentiments of the resolutions which have been offered are in cordial accord with the feelings of the members of this bar, and I trust that they may be adopted and written upon the records of the court.

All that was mortal of our departed friend and associate moulders in the soil of his native town and State; but his standing and character as a lawyer, as a judge, and as a man, all that he was to this court and to this community, are imperishable, and will be held in grateful remembrance and jealous regard.

Frederick H. Gillett, Esq., addressed the court as follows:

May it please your Honors: The same reasons which probably influenced the bar in assigning me to the committee on resolutions make it, I think, proper that I should add a word of appreciation of Judge Soule. I knew him only in his later life, from the time when he resigned his seat as your Honors' associate and then invited me to become his partner. I had indeed then known him for years in that casual intercourse

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which often develops into friendship, yet in me he had awakened — and it was perhaps characteristic of the man — no feeling less formal than respect. I was taken at once, necessarily, into his intimacy and confidence, and my cold acquaintance developed into a warm admiration and personal affection, which increased until his death.

I imagine it is often true, on the principle *Omne ignotum pro magnifico*, that a senior partner appears to his junior in less grand proportions than to the world at large. Certainly, as far as concerns strength and keenness of intellect, delicacy of moral fibre, and geniality and even joviality of disposition, the very reverse of this was true of Judge Soule. The more I witnessed the workings of his mind, the more I admired its native force and its trained dexterity. There were constantly recurring instances of the quick penetration and strong grasp with which he instantly seized the vital elements of a case, the acute discrimination with which he compared and weighed balancing and contradictory phases, distinguishing closely and refining deeply, but controlling all his processes by a masterful common sense. He leaped quickly, often instantaneously, to his conclusions, and was confident in upholding them; but it was confidence in an eye that could see clearly where most would grope in a haze. This, to my mind, was his chief distinction, — a strong, clear mental vision, which pierced easily into obscurity, and saw objects in their true proportions and perspective. I should characterize him as more strong than profound, more sagacious than learned, more quick and penetrating than exhaustive; a man with a brain of the very first quality, disciplined into instant obedience.

The law was to him a profession, never a trade. He was scrupulously careful that his opinions should be correct, though he was never anxious; and I sometimes fancied his sensitiveness in this regard was a relic of his judicial experience, a sort of feeling of *noblesse oblige*, and that his solicitude that his decision should be right when it was only the opinion of a lawyer was akin to that sense of responsibility which must weigh upon every one whose words are *ipso facto* law. If in the conduct of a case the thought what course would best promote his selfish interest ever entered his mind, I am sure it never governed his

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action. He scorned low ends, and base methods, and dishonorable weapons, and would never affect to conceal his scorn. Indeed, his contempt for finesse, and artifice, and indirection, extended to the milder and more innocent methods of winning popularity and success; and he would never seek so to ingratiate himself that "thrift may follow fawning."

I went to him immediately from a similar association with one whom your Honors and the whole bar of Massachusetts knew and honored, the late George Marston, and it may not be unduly personal or out of the line of this occasion to suggest the singular contrast their characteristics and careers present, honorable alike to both. Both were endowed with unusual abilities. The life of one opened on the sands of Cape Cod, where modern ideas make slowest headway, and he had for early culture only the advantages which our remotest district offers to all her children; the other was born in the very groves of the academy, surrounded by the most fastidious culture, and reared in a constant atmosphere of refined scholarship. Not improbably the earnest, practical struggle with life of the one broadened his sympathies, while it tended, perhaps, to blunt sensibilities; as the studious seclusion of the other tended to dull at least the expression of general sympathies, while it quickened sensitiveness. One started in his profession with mind and faculties completely equipped, with all the polished weapons education could furnish, but needed clients; the other in his upward progress had won friends and clients, but needed erudition. Both found what they needed in full measure, and it seems to me their prosperous careers and the goals which they attained were exactly what a scientific forecast would have indicated, and exemplify the influence of environment, one becoming the Attorney General, the other the Justice, one dealing with and mastering facts and men, the other principles and abstractions.

Where in Judge Soule's career his faculties found their most useful and congenial sphere, I will not presume to determine; but if it was true of him, as it is in general of us all, that what we enjoy doing we do well, then I am confident that his association with your Honors was his most successful field, for I have heard him speak of the deliberations and discussions and displays of intellectual strength in the consultation room with a

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zest and warmth and enthusiastic admiration which I never knew him to exhibit toward any other forum of the profession.

His private life was pure and his morals were irreproachable. While he did not wear his heart upon his sleeve, he was in the unrestrained society of his friends a most delightful companion. Cordial, hearty, fond of fun, enjoying a joke, even at his own expense, quick at repartee and quotation and allusion, bright and witty, — not a wit that sparkled coldly without warming your good will, but a genial humor that while it entertained you drew you into closer fellowship with him, — in his society you always knew that no witticism was too subtle, no allusion too recondite, no humor too lively, no discussion too deep or too wide for his appreciation. And beneath all was a warm heart beating with ready sympathy. I never found a draft upon his kindness dishonored; and, while I deplore the public loss, I mourn most deeply the true, affectionate, warm-hearted friend.

Chief Justice Morton responded as follows:

Brethren of the Bar: We receive with the deepest sensibility your tributes of respect and affection to our deceased associate and friend, Judge Soule. The death of such a man, in the midst of useful and honorable work, in the full maturity of his powers, before age has weakened his faculties or impaired his capacity for useful labor, is of itself a solemn and impressive event. But this afflictive event is made more impressive and significant to us from the fact that in late years we have been so frequently called upon to deplore the loss of those associated with us in our duties. In the last five years during which I have been Chief Justice, we have lost by death or by sickness six of those who have served as Justices of this court, only one of whom had reached the age of threescore years and ten.

This is not an occasion on which to attempt an elaborate eulogy, but I desire, on behalf of the court, to express, in few words, the enduring respect and affection which we entertain for our deceased friend, and our deep sense of the great loss which the profession and the community have sustained in his death.

Judge Soule was born in 1827. His father, the Rev. Gideon Soule, was for many years the Principal of Phillips Academy at Exeter, then, as now, one of the most celebrated preparatory

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schools for boys in the country. The Judge inherited from him a sound mind in a sound body. He was of a robust and vigorous frame, healthy and strong, capable of enduring constant and exacting labor. He also inherited an intellect vigorous and logical, and also scholarly and delicate, and a high-toned, noble moral character. His natural tendency and the habit of his life was to look to high and ennobling aims. He was a graduate of Harvard College and of the Law School connected with it; and, very soon after leaving the Law School, he established himself in Springfield as a member of your bar. His history here is familiar to all of you. After a few years, he associated himself with the lamented John Wells, and soon became one of the most prominent of your members. Who can wonder that two such men were drawn to each other? Both were of the same nobility of character, both loved the law as a science and were diligent and assiduous in its study, both had habits of exact and thorough investigation, both were faithful to duty, modest, unselfish, just, and conscientious. By an unusual coincidence both afterwards served with marked ability as Justices of this court.

The service of Mr. Justice Soule was unfortunately of brief duration. He was appointed in 1877, and resigned in 1881. He discharged his important duties with great ability and with punctilious fidelity. His mind was quick to perceive the point involved in any case before him, and comprehensive to see its bearings and relations, and its effect upon the rights of parties. At nisi prius trials, he was patient, courteous, self-possessed, and firm. In consultation, he was logical and forcible in discussion, concise and clear, and never obscure, in presenting his arguments, with the frank manliness which never hesitated to differ from his associates, accompanied by a spirit of candor which led him readily to yield his own impressions when he found that the weight of argument and reason was against him. When at the end of four years he resigned, he had so commended himself to the profession and the public, by the satisfactory performance of his duties, that his retirement was universally felt to be a great public loss. He resigned with great reluctance, after a severe struggle between his own inclination and tastes and the promptings of duty to his family. It is a pleasure to us to reflect that his duties while with us were pleasant and congenial to

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him, and that his term of service here was the happiest period of his life. After he left us, his time was absorbed by the duties of his new position. He was often called upon, in the performance of those duties, to argue questions of law before us; and his arguments were always models of clear, concise, and forcible statements and illustrations of his views.

We cannot fully express our estimate of the worth of Mr. Justice Soule without referring to the many attractive traits of his personal and private character and life. To the stranger, upon first acquaintance, he may have appeared dignified and somewhat distant and cold in his manner. But a short acquaintance was sufficient to lead to admiration of his kind and sympathetic heart, his urbane and courteous manners, his ready and delightful flow of wit and repartee. In his family and private life he was ever affectionate, kind, cheerful, hospitable, and unselfish, — a fond husband and father, a firm friend, and a delightful companion.

For the last two or three years of his life he knew that disease had fastened itself upon him, and that in a short time it must result fatally, a fact known to very few except to his family and his physicians. All who saw him during these years know that he bore this affliction with brave resignation and Christian fortitude, maintaining to the last the cheerfulness and unselfishness which had marked his whole life. We, who knew him well, mourn the loss, not only of an upright, able magistrate and lawyer, but of an esteemed and beloved friend.

I have spoken of two of the members of this bar who have honored it by faithful and able services upon this bench. To these should be added the honored name of Chief Justice Chapman. Truly the bar of Hampden County may indulge a just pride in the memory of such eminent lawyers and jurists as Judges Chapman, Wells, and Soule.

We can only add, that we concur in the expressions of esteem and affection contained in your resolutions, and shall order that they, together with a memorandum of these proceedings, be entered upon the records of the court.

The Court then adjourned.

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ACCORD AND SATISFACTION.

A. had a claim against B. for one third of the net profits of an enterprise in which they were jointly engaged. He sent a letter, requesting B. to render an account. B., in reply, sent a letter, enclosing an account, in which he credited A. with one third of the profits, and charged him with a certain sum, claimed to be due for B.'s services, and also enclosing a check for the balance of the account thus stated. A. credited the check to B. on account, and forthwith demanded of B. payment of the sum so charged to him by B.; and, upon B.'s refusal to pay, brought an action against him. *Held*, that the facts did not show an accord and satisfaction; and that the action could be maintained. *Tompkins* v. *Hill*, 379.

ACCOUNT.

See ACCORD AND SATISFACTION; EQUITY, 7.

ACTION.

1. A lessee of a building, who sustains personal injuries occasioned by the defective condition of the building, cannot maintain an action of tort against the lessor, founded upon a breach by the lessor of an agreement to repair the building within a reasonable time. *Tuttle* v. *Gilbert Manuf. Co.* 169.
2. Land abutting on a public street in a city was sold under a power contained in a mortgage, and the owner of the equity of redemption released any title he might have to the purchaser, and was allowed by the purchaser to remain in possession under an agreement that he should pay rent at a certain rate monthly. At the time of the sale there was an open and visible defect in the cover of a coal-hole in the sidewalk in front of a house on the land, which hole led to the cellar of the house. In consequence of this defect, during the tenancy, a person walking on the sidewalk fell into the hole. *Held*, that he could maintain an action against the purchaser of the land for the injury thereby sustained. *Dalay* v. *Savage*, 38.
3. In an action against the owner of a building for personal injuries occasioned to the plaintiff by a fall down an elevator well in the building, it appeared that the plaintiff, who was a plumber, was employed by A., a

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tenant of a portion of the building, to do some work therein; that, in the prosecution of his work, he opened a door leading into the well, it being unlighted and without a barrier, and fell, receiving the injuries complained of; that the door to the well had been provided with a lock, had been locked, and the key deposited in the defendant's office; and that this was the only key known by the defendant or his agent to exist, and it was found in its place in the defendant's office after the accident. There was evidence that a key had been procured by A. and used, but without the consent or knowledge of the defendant or his agent; and that the neglect of A. in unlocking the door and in leaving it unlocked caused the accident. The lease to A. gave him a right to the use of the elevator in common with the other tenants. *Held*, that the action could not be maintained. *Handyside* v. *Powers*, 123.

4. A. owned and kept a public house and grounds, and in connection therewith owned a way to a navigable river, and a landing place on the river, by which persons had access to his house from the river. The river at A.'s landing was obstructed by sand, which was caused to be deposited there by B.'s boom above, and by logs which were stranded there while being floated down the river by B., whose acts were illegal. *Held*, that the diminution in A.'s business and profits caused by obstructing the river at his landing place, cutting off access to it from the river, and preventing persons from passing from the river to his house, constituted special and peculiar damage to him, for which he could maintain an action against B. *Held*, *also*, that evidence of the diminution in the number of visitors to A.'s house, and in the receipts and profits from them, caused by the acts of B. in obstructing the landing place, was competent upon the question of the loss occasioned to A. in his business. *Held*, *also*, that the judge properly refused to rule that A. could recover only for the expense of removing the obstructions. *French* v. *Connecticut River Lumber Co.* 261.

5. While a bill in equity, brought by a mill-owner on a natural stream against the owner of a reservoir higher up on the same stream to restrain the defendant from preventing the flow of the water to the plaintiff's mill, and for damages, was pending, the defendant wished a hearing on the question of granting a preliminary injunction postponed, and the plaintiff agreed to this, on the defendant's promise that sufficient water should be allowed to flow to the plaintiff's mill in the mean time. *Held*, that the plaintiff could not maintain an action at law against the defendant for breach of this agreement. *Howe* v. *Salisbury*, 279.

6. A girl, eight years and one month old, while on her way to school, sat down on the curbstone of the sidewalk, with one leg under her and the other leg projecting into the street, leaned over, and began to sharpen a slate pencil. She knew that there was much driving on the street, but did not look to see whether any wagon was coming. While so sitting, she was struck by a wagon, and run over. *Held*, that the question whether she was in the exercise of due care was for the jury. *O'Shaughnessy* v. *Suffolk Brewing Co.* 569.

See ACCORD AND SATISFACTION; BANKRUPT; COLLATERAL SECURITY, 1; CONTRACT, 2; CONVERSION; FALSE IMPRISONMENT; INNKEEPER;

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INSURANCE, 5; INTOXICATING LIQUORS, 7, 31, 33, 34; LANDLORD AND TENANT; LEASE, 3; LIMITATIONS, STATUTE OF, 1, 3; MASTER AND SERVANT, 1; MORTGAGE, 2, 4; PAUPER; RAILROAD, 7–9, 12; SCHOOL; STATUTE, 2; WAY, 3–7.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADULTERY.

At the trial of an indictment for adultery, the evidence was conflicting upon the question whether the parties named in the indictment had occupied the same room; and the judge instructed the jury as follows: "If they occupied together the room known as the parlor, that is evidence enough to warrant you in finding adultery. That is as strong evidence as is usually found in adultery cases." This being excepted to, the judge said, "I withdraw those instructions and instruct the jury as follows: If a married man is found with a woman not his wife in a room with a bed in it, and stays through the night with her there, that is sufficient to warrant a finding of adultery against him." *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Clifford*, 97.

See DIVORCE.

AGENT.

See PRINCIPAL AND AGENT.

AGREED FACTS.

See EQUITY, 3; RAILROAD, 5, 6.

ALTERATION OF BALLOT.

See ELECTION.

ANIMAL.

See CRUELTY TO ANIMALS.

ANSWER.

See PLEADING, III.

APPEAL.

1. If an appellant from a decree of the Probate Court, who claims his appeal seasonably, gives due notice thereof, and duly files and serves on the adverse party his reasons of appeal, omits, through accident and mistake, to enter his appeal in this court at the proper time, he is not entitled, under the Pub. Sts. *c.* 156, §§ 9, 10, to maintain a petition to this court for leave to enter the appeal, filed more than a year after the decree of the Probate Court was rendered. *Briggs* v. *Barker*, 287.

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2. If an appeal is taken to the Superior Court from a judgment of a trial justice, under the Pub. Sts. *c.* 155, § 28, and the appellant fails to recognize to the adverse party, as required by § 29, or to deposit with the trial justice a reasonable sum as security for the prosecution of the appeal and the payment of costs, the Superior Court has no jurisdiction of the appeal; and, on a petition to that court for leave to enter the appeal, parol evidence is inadmissible that the appellant offered to recognize, or to deposit a reasonable sum as security, and that the trial justice refused to allow him to do either. *Tibbetts* v. *Handy*, 537.

3. At the trial, on appeal, of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the conviction of the defendant must be of the same offence of which he was convicted in the court below, but need not be upon the same evidence. *Commonwealth* v. *McNeff*, 406.

See COMPLAINT, 3, 4; INSOLVENT DEBTOR, 3, 4; RECORD, 2; TRIAL JUSTICE.

ARBITRAMENT AND AWARD.

A case pending in court was sent to an auditor. The parties and a third person appeared before the auditor and filed with him an agreement appointing him referee, and submitting to him all matters in dispute between the three, growing out of a certain matter referred to in the declaration. The agreement was headed with the name of the case and the court in which it was pending. The submission was stated to be "in the above entitled action," the referee was to report to the court, and final judgment was to be entered in the action upon the coming in of the referee's report. No rule of reference was issued by the court. *Held*, that the agreement was not one *in pais*, and did not work a discontinuance of the action. *Held, also*, that, as the defendant was not indebted to the plaintiff and to the third person jointly, no rule of reference could have been issued in the action; and that the referee's award could not be accepted. *McCarthy* v. *Swan*, 471.

ARREST.

See FALSE IMPRISONMENT; POOR DEBTOR, 2, 3; RAILROAD, 10; WARRANT.

ARREST OF JUDGMENT.

See RECORD, 1, 3.

ASSAULT.

See RAILROAD, 10.

ASSENT.

See RAILROAD, 2.

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ASSIGNMENT.

See INSOLVENT DEBTOR, 2.

ASSUMPSIT.

See PAUPER, 2.

ATTACHMENT.

See CONTRACT, 3; EXECUTOR AND ADMINISTRATOR; INSOLVENT DEBTOR, 1; MORTGAGE, 2-4.

ATTORNEY AND COUNSEL.

See INTOXICATING LIQUORS, 1; TRIAL, 2

AUDITOR.

See ARBITRAMENT AND AWARD; CONTRACT, 2.

AUTREFOIS ACQUIT OR CONVICT.

A conviction on a complaint for keeping and maintaining a tenement for the illegal sale and illegal keeping of intoxicating liquors from August 1 to October 4, is a bar to a complaint for keeping the same tenement for the same purpose from May 1 to November 17 of the same year; and the government has no authority to enter a *nolle prosequi* as to so much of the offence as is charged in the second complaint to have been committed prior to October 5. *Commonwealth* v. *Dunster*, 101.

AWARD.

See ARBITRAMENT AND AWARD.

BAILMENT.

See INNKEEPER; RAILROAD, 7, 8.

BANK.

See EQUITY, 5, 6.

BANKRUPT.

An assignee in bankruptcy made a contract with the bankrupt to convey to him a parcel of land belonging to the estate, and was authorized by a decree of court so to convey it. At the request of the bankrupt, after the price was paid, the land was conveyed to the bankrupt's wife, and the deed was delivered to him as his wife's agent. *Held*, that the conveyance was valid, and that the bankrupt could not maintain an action for a subsequent trespass committed on the land. *Wilson* v. *Winslow*, 339.

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BASTARDY PROCESS.

See JUDGMENT.

BAWDY-HOUSE.

At the trial of a complaint for keeping a tenement used as a house of ill-fame in G., a police officer testified that he visited the premises on a certain day, and in one of the rooms found two women in bed together, but no man with them, and in an adjoining room found another woman in bed, but with no man. The government then asked the witness, "What was the reputation of these three women for chastity in G.?" The defendant objected to this question, but the judge allowed it to be put, and the witness answered that it was bad. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Clark*, 251.

See COMPLAINT, 6, 7; HUSBAND AND WIFE, 3, 4.

BENEFICIARY ASSOCIATION.

1. A beneficiary association was organized under the Pub. Sts. *c.* 115, §§ 2, 8, for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of deceased members or to their heirs. The by-laws of the association provided, that, after payment of the expenses of the funeral and of the last sickness, the balance should be paid to the person designated by the member in his application for membership, or last legal assignment, provided such person was an heir or member of the decedent's family, and, if either of the persons designated should die, the sum which would have been payable to him if he had lived should be paid to the widow of the designator for the use of herself and her minor children. A member of the association designated his wife as his beneficiary. She afterwards obtained a divorce from him, and he, after this, changed the designation to his son and to his married sister, the latter not being a member of his family and not dependent on him for support. *Held*, that the wife, by obtaining a divorce, lost her rights under the designation; that the attempted designation to the sister was invalid; and that the son was entitled to the fund. *Tyler* v. *Odd Fellows' Relief Association*, 134.
2. A member of a beneficiary association organized under the Pub. Sts. *c.* 115, §§ 2, 8, had certificates in two classes, each for $1000. Before his death he designated his minor son as his beneficiary to the amount of $500, and his sister as his beneficiary to the amount of $1500. The latter designation was in fact invalid. On his death, the guardian of the son told the president of the association that he thought the son was entitled to $2000. The president did not dispute that the son was entitled to $500, but claimed the balance as belonging to the sister. The guardian yielded to this claim, believing it to be well founded, and received $500, understanding that the association was about to pay $1500 to the sister, and signed a receipt, acknowledging that the $500 was received in full of all

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demands or claims against the association. The association then paid the $1500 to the sister. *Held*, on a bill in equity brought by the son against the association to recover the $1500, that, if the receipt could be construed as an agreement not to claim the $1500, there was no consideration for it. *Held, also*, that the son was not estopped to maintain the bill by the conduct of his guardian. *Tyler* v. *Odd Fellows' Relief Association*, 134.

BOND.

See EQUITY, 5, 6; PRINCIPAL AND SURETY.

BURDEN OF PROOF.

See ESCAPE, 2.

BY-LAW.

See BENEFICIARY ASSOCIATION, 1; CITY.

CARRIER.

See RAILROAD, 7, 8.

CASE STATED.

See EQUITY, 3; RAILROAD, 5, 6.

CHARITABLE ASSOCIATION.

See BENEFICIARY ASSOCIATION.

CHARITY.

See CONSTITUTIONAL LAW.

CHILD.

See ACTION, 6; INTOXICATING LIQUORS, 2, 31, 32, 34; WAY, 4.

CITY.

1. If the charter of a city provides that its by-laws or ordinances shall take effect, and be in force, from and after the time therein respectively limited, without the sanction of any court, or other authority whatever, the provisions of the Pub. Sts. *c.* 27, § 23, and of *c.* 28, § 2, as to publication of by-laws or ordinances, do not apply. *Commonwealth* v. *McCafferty*, 384.
2. An ordinance of a city, providing that "no person shall place or carry, or cause to be placed or carried, on any sidewalk, any show-board, placard, or sign, for the purpose of there displaying the same," is reasonable and valid. *Ib.*

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3. At the trial of a complaint for a violation of an ordinance of a city, providing that "no person shall place or carry, or cause to be placed or carried, on any sidewalk, any show-board, placard, or sign, for the purpose of there displaying the same," it appeared that the defendant walked upon the sidewalk of a street in the city, having over his shoulders a piece of oil cloth, which he wore like a vest or coat, on which was printed the inscription, "Lasters on strike. All lasters are requested to keep away from P. P. Sherry until the present trouble is settled. Per order L. P. U." *Held*, that the defendant's act was a violation of the ordinance. *Commonwealth* v. *McCafferty*, 384.

See STATUTE, 2; WAY, 3–11.

CIVIL SERVICE.

Under the St. of 1887, *c.* 437, persons who served in the army or navy of the United States in the time of the war of the Rebellion, and were honorably discharged therefrom, cannot be preferred for appointment to office or employment in the service of the Commonwealth or the cities thereof, without having made application for appointment to office or employment to the civil service commissioners, as required by the St. of 1884, *c.* 320, and the rules of the civil service commissioners made thereunder. *Opinion of Justices*, 587.

COLLATERAL SECURITY.

1. Where a debtor executes a collateral agreement to deliver, on demand, certain property as security for the payment of a debt, a demand made after the debt is barred by the statute of limitations is too late. *Shaw* v. *Silloway*, 503.

2. If A. transfers shares of stock owned by him to a bank, as collateral security for the promissory note of B., and, on the note becoming due, a new note is given by B. to the bank in renewal, the parties to the note not intending that the debt represented by the original note shall be thereby paid or discharged, the bank is entitled to hold the shares of stock as security for the payment of the new note, even though the renewal is made after the death of A. *Cotton* v. *Atlas Bank*, 43.

3. A., at the request of B., transferred shares of stock to a bank as collateral security, knowing that the bank was to lend money to C., and leaving the details of the transaction to B., who was her son and her general agent. B. procured his promissory note to be discounted at the bank, and the money thus obtained was given to C. The note stated that the shares of stock were held as collateral security. New notes were given from time to time in renewal of the old note, and one of these stated that the shares were held as collateral security for any liability of B. due or to become due to the bank, and that might be afterwards contracted. This was done inadvertently, and without any intention to pledge the shares for any liability other than that for which they were originally pledged. After the death of A., B. being indebted to the bank on one of the notes given in renewal and on another note for which certain shares of stock were pledged as

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collateral security, and both notes being then overdue, B. gave a new note for the amount due on both of the overdue notes, and this note stated that certain shares of stock were pledged as collateral security for its payment. These shares were the same as those before pledged as security for both notes. Partial payments were made on the new note from dividends and sales of the shares pledged by A. *Held*, on a bill in equity by the executor of A.'s will against the bank, that the defendant was entitled to hold the shares of stock for the original debt contracted by B., after deducting the payments that had been made. *Cotton* v. *Atlas Bank*, 43.

See FRAUDULENT REPRESENTATION, 4.

COMPLAINT.

1. A complaint may be made by any one who is competent to make oath to it. *Commonwealth* v. *Carroll*, 403.
2. If a court has jurisdiction over offences committed within a certain city, a complaint to that court, which alleges the offence to have been committed at that city, sufficiently alleges the jurisdiction of the court. *Ib.*
3. A formal defect in a complaint cannot be availed of for the first time in the Superior Court on appeal. *Commonwealth* v. *Turner*, 296.
4. In a complaint for throwing a missile at a car, any defect in the description of the car, or defect in respect of the place where the car was at the time, is a defect in form, which cannot be availed of for the first time in the Superior Court on appeal. *Commonwealth* v. *Carroll*, 403.
5. At the trial of a complaint for an unlawful sale of intoxicating liquor to a person unknown to the complainant, the defendant put in the testimony of one M., that he told the complainant, about a week before the complaint was made, the name of the person to whom the unlawful sale relied on was made. The complainant testified, in answer to the question whether he knew, when he made the complaint, the name of the person to whom the sale was made, that he did not know the man. On cross-examination, he testified that he did not remember that M. told him the name of the person who bought and paid for the liquor; that he could not say, and would not like to say, that he did or did not tell him the name of the person. *Held*, that the question was properly submitted to the jury, whether the allegation that the name of the person to whom the sale was made was unknown to the complainant was sustained by the evidence. *Commonwealth* v. *Pratt*, 248.
6. A complaint against A. and B. for keeping and maintaining, at a time and place named, a certain tenement, "then and there used by said A. and B. as a house of ill-fame, resorted to for prostitution, lewdness, and for illegal gaming, and then and there used by said A. and B. for the illegal sale and for the illegal keeping of intoxicating liquor, said tenement, so used as aforesaid, being then and there a common nuisance," is sufficient, under the Pub. Sts. *c.* 101, § 6. *Commonwealth* v. *Clark*, 251.
7. It is no objection to a complaint for keeping and maintaining a tenement used as a house of ill-fame and for the illegal sale and illegal keeping of intoxicating liquors, that the time of the continuance of the offence, as

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alleged in the complaint, extends beyond a period of six months. *Commonwealth* v. *Clark*, 251.

See APPEAL, 3; DISTRICT COURT; EVIDENCE, 2; INTOXICATING LIQUORS, 1–6, 8–20, 22–30; LORD'S DAY, 1; RECORD, 3.

CONDITION.

See EQUITY, 2.

CONSIDERATION.

See BENEFICIARY ASSOCIATION, 2; CONTRACT, 2; EVIDENCE, 6; PROMISSORY NOTE, 2, 3.

CONSTITUTIONAL LAW.

Section 4 of the St. of 1849, *c.* 96, (which statute incorporated the Trustees of the Smith Charities,) providing that the funds of the corporation shall, for the purpose of taxation, "be equally apportioned among the eight towns named in said will, ... or such of them as shall not have forfeited their rights therein; and said apportionment shall be made, and the assessors of each of said towns shall be notified of the same by the trustees provided for in said will, on or before the first day of May annually; and the portions of said funds thus assigned to the said towns respectively may be assessed therein, in all the taxes legally voted and assessed by said towns," is constitutional. *Northampton* v. *County Commissioners*, 108.

CONTRACT.

I. *Making.*

See PAUPER, 3.

II. *Consideration.*

1. In an action upon a paper writing, signed by the defendant, a married woman, and reciting the receipt from the plaintiff of a certain sum to be paid to him in the stock of a certain corporation, or in cash, within a time named, the plaintiff testified that he and the defendant's husband made a settlement, at the latter's house, of demands which the plaintiff had against him; that the husband proposed to give to the plaintiff in settlement the stock named in the paper declared on, or a certain sum, in ten days; that the husband said that the stock was in the defendant's name; that she was in the house, but was not present in the room with them; that the husband wrote the agreement, and left the room to get his wife's signature to the paper; and that he soon returned with the paper signed by her. The defendant and her husband were present at the trial, but did not testify. *Held*, that the judge properly submitted to the jury the question whether the defendant knew of the consideration for her agreement. *Marble* v. *Mellen*, 342.

See BENEFICIARY ASSOCIATION, 2; CONTRACT, 2; EVIDENCE, 6; PROMISSORY NOTE, 2, 3.

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III. *Validity.*

2. In an action against the administrator with the will annexed of the estate of A., on an alleged agreement by A. to bequeath to the plaintiff $5000, an auditor, to whom the case was referred, found that the plaintiff was the brother-in-law of A., an unmarried woman, and lived in the same house with her, and advised with her as to her investments; that she said if she made a profit on one investment managed by the plaintiff she would give him one half, and on this she made a profit of $10,000; that, soon after, she told the plaintiff that if he would go on and act as her adviser she would make a will giving the plaintiff's wife a legacy of $5000, and if his wife died before the plaintiff she would, by a new will, leave this sum to him; that such a will was made; that, afterwards, the plaintiff assisted A. in making many profitable investments; that subsequently, when the plaintiff's wife was fatally ill, A. said to the plaintiff, that, if he would accompany her on a visit to California, she in consideration thereof, and in consideration of the services he had rendered and might thereafter render to her, would make a will leaving him $5000; that the plaintiff assented, and the will was made, the old will being destroyed; that the plaintiff accompanied A. on the journey proposed, and in all respects complied with the agreement; and that, subsequently, A. made a new will which revoked the former will and left nothing to the plaintiff. *Held*, that, these facts not being controverted, the judge who tried the case without a jury was not warranted in finding that the facts did not show that A. entered into a binding agreement with the plaintiff, or in finding that the agreement declared on was not proved as alleged; and that he should have found that the plaintiff was entitled to maintain the action. *Wellington* v. *Apthorp*, 69.

IV. *Construction.*

3. A., a creditor of C., brought an action against him, and attached his goods. B., another creditor of C., had attached his goods on a writ prior to A.'s attachment, and had recovered judgment. Before execution issued on said judgment, A. threatened to begin proceedings in insolvency against C. Thereupon B. agreed that if, after demand made by A. upon B., after the sale upon said execution of all the property attached in said action, and after the money realized upon such sale should have passed into the hands and possession of B., he should refuse to pay to A. one half of the amount which B. should have realized upon said execution, after all the costs and fees arising from and by reason of said action and said execution should have been deducted, then D might indorse to A. a certain promissory note made by B. to D., and not otherwise. A. did not institute insolvency proceedings against C. B.'s attachment was perfected, the attached property was sold, and a certain sum realized; and B., upon request, refused to comply with his agreement with A. Subsequently, and while the proceeds of said sale were in the hands of the officer, the assignee in insolvency of C. brought a bill in equity against B. and the officer to avoid B.'s judgment and to recover the proceeds of the sale, and the officer

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was restrained from paying them to B. That suit was compromised by the payment of a part of the proceeds to the assignee, and the balance was paid to B.'s attorney in payment of costs and fees in said suits. A. then brought a bill in equity against B. and D. to enforce said agreement. *Held*, that the contingency on which the note was to be indorsed to A. had not arisen; and that the bill could not be maintained. *Steele* v. *Nash*, 198.

4. A., the owner of land with growing trees upon it, entered into a contract, under seal, with B., which stated that A. "agrees to sell," and B. "agrees to buy" all the hemlock bark, and all the hemlock and spruce timber standing on the land. B. agreed to cut and remove the same within four years, to cut and remove a certain amount each year, and to pay certain prices per cord for the bark, and per thousand feet for the timber. It was further agreed that all the trees that were down, or that should thereafter fall, should be cut and paid for by B. The contract provided for measurements to be made by A. on notice to B., and for notice to A. by B. when a sufficient quantity was ready for measurement. *Held*, that the contract was an executory agreement for the sale of timber and bark; that the property in the trees did not pass to B. until they were cut; and that, on B.'s not fulfilling his contract, A. was entitled to recover only such damages as he had sustained on the basis that the timber and bark remained his property until severed from the soil. *United Society* v. *Brooks*, 410.

See CONTRACT, 2.

V. *Performance and Breach.*

5. An action against an executor, for breach of an agreement to purchase land, made by his testator, cannot be maintained, if there were defects in the plaintiff's title of such a kind that he was never in condition to perform his part of the contract, and the testator did not repudiate the contract, but the plaintiff granted delay at his request, and the term of such delay had not expired at his death, and no offer to carry out the contract was made to the defendant, and no demand made upon him before bringing the action. *Langley* v. *Dauray*, 325.

See ACTION, 5; CONTRACT, 2, 3; DEED; LEASE, 2.

VI. *Rescission.*

See INFANT, 1.

CONTRIBUTION.

See DEVISE AND LEGACY, 3.

CONVERSION.

B. made a contract with A., an owner of land, to build a house for A. on the land. Before the house was finished, A. requested B. to remove certain chattels, then on the land and used by B. in building the house, to

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another part of the land. B. unreasonably neglected to do so, and A. removed them to another part of the land, doing no unnecessary damage to them. *Held*, that even if B. had an unrevoked license to have the chattels on the land, he could not maintain an action against A. for their conversion. *Shea* v. *Milford*, 525.

See CORPORATION, 1.

CORPORATION.

1. In an action for the conversion of personal property, a mortgage of the property to the plaintiff, purporting to be executed in the name of a corporation by its president and under its corporate seal, is sufficient *prima facie* evidence of the incorporation, and of the authority of the president to execute the mortgage. *Hamilton* v. *McLaughlin*, 20.
2. Proof of a statute chartering a corporation under a particular name, and of other statutes authorizing the corporation to do particular acts, and the act of the railroad commissioners approving the consolidation of the corporation with another corporation, in pursuance of an authority conferred upon them by statute, will warrant a finding of the existence of the corporation, and of its ownership of property which it employs in exercising its franchise. *Commonwealth* v. *Carroll*, 403.
3. The existence of a corporation, not organized under the Pub. Sts. *c.* 106, and which has not availed itself of the provisions of § 22, may be proved, without producing the certificate of the Secretary of the Commonwealth mentioned in that section. *Ib.*
4. A corporation purchased all the property of another corporation, and all the shares of its capital stock except six. After this, the officers of the purchasing corporation were chosen officers of the selling corporation, and the six shares of stock were transferred to them. *Held*, that the purchasing corporation did not thereby acquire a right to do an act granted to the selling corporation by its charter, but which was contrary to the general laws of the Commonwealth. *French* v. *Connecticut River Lumber Co.* 261.

See EMINENT DOMAIN; EQUITY, 7, 10; RAILROAD, 2, 9; TRUST AND TRUSTEE, 1; WATERWORKS.

COSTS.

Three actions of slander were brought by the same plaintiff against three different defendants for the same or similar defamatory words; and, by agreement of parties, they were referred to the same referee, who heard them together on three consecutive days, and made an award in each case in favor of the defendant, on which judgment was entered. The certificate of witnesses filed in each case showed that the same witnesses for the defendants attended in each case the same number of days and travelled the same number of miles, with a trifling exception. *Held*, that the fees for the attendance of witnesses should be taxed in all the cases, but that the fees for their travel should be taxed only in the case in which they were summoned. *Barber* v. *Parsons*, 203.

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COUNTY COMMISSIONERS.

The salary of an employee of a jail and house of correction was established by the county commissioners, under the Pub. Sts. *c.* 220, § 26, and increased by the Superior Court, under § 27. More than a year afterwards, the county commissioners reduced the salary. *Held*, that the salary fixed by the Superior Court did not continue until the further order of the court, and that the action of the county commissioners was legal. *Vose* v. *Essex*, 500.

COURT.

See District Court; Probate Court; Superior Court; Supreme Judicial Court; Trial Justice.

COVENANT.

See Deed; Equity, 1; Evidence, 6; Lease, 2.

CRUELTY TO ANIMALS.

1. A captive fox is an "animal" within the Pub. Sts. *c.* 207, § 53. *Commonwealth* v. *Turner*, 296.
2. A person who lets loose a captive fox to be hunted by dogs may be convicted of subjecting the fox to unnecessary suffering, under the Pub. Sts. *c.* 207, § 53. *Ib.*
3. A complaint alleged that the defendant had the custody of a fox, and knowingly and wilfully permitted the fox to be subjected to unnecessary suffering, by turning the fox loose to be hunted by dogs, in consequence of which the fox was hunted by dogs, and thereby subjected to unnecessary suffering. The evidence was that the defendant, in the presence of a number of men with dogs, let the fox loose within two rods of a piece of woods; that the fox ran into the woods, and was at once lost sight of; and that five minutes afterwards the dogs were let loose and ran after the fox; and there was no evidence that they were seen again that day. There was also evidence that, half an hour after the fox was released, a fox was found dead in the woods, a quarter of a mile away, with his side torn open. *Held*, that the evidence was sufficient to warrant the conviction of the defendant. *Ib.*

CUSTOM.

See Town, 2.

DAMAGES.

See Action, 4; Contract, 4; Escape, 1; Poor Debtor, 4.

DEATH.

See Presumption; Railroad, 11.

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DEED.

A., the owner of a tract of land, having a house on the southerly side, and bounding on the north on a turnpike, conveyed the northerly portion of it to B., reserving to himself, his heirs and assigns, a right of passageway from his house to the turnpike. A. subsequently sold the remainder of the estate to C., and conveyed to him, his heirs and assigns, the right of a passageway from the dwelling-house on the estate to the turnpike. C. divided the land into two lots, and sold the southerly lot to D. and conveyed to him, his heirs and assigns, a right of passage to the turnpike. Subsequently, B. sold the lot on the turnpike to E., "reserving to the owner and his assigns of the adjoining estate, formerly of A., the right of a passageway to the turnpike." The heirs of E. afterwards sold the lot on the turnpike to F. "reserving to the owner of the estate and others adjoining on the south a right of passageway over the within granted premises as specified in deed of B. to E." *Held*, that the language of the two deeds last named as to the passageway constituted an exception, and not a reservation, and that the exception was not confined to the right which the owner of the lot immediately adjoining on the south might have to a passageway, but applied also to the right of the owner of the most southerly lot owned by D. *Held, also*, that there was no breach of a covenant against incumbrances contained in the deed to F. *Wood* v. *Boyd*, 176.

See BANKRUPT; EVIDENCE, 6; LEASE; MORTGAGE, 1.

DEFAULT.

See JUDGMENT.

DELIVERY.

See BANKRUPT.

DEMAND.

See COLLATERAL SECURITY, 1; CONTRACT, 5; MORTGAGE, 2-4.

DEVISE AND LEGACY.

1. A bequest of the testator's "bank stock" is to be construed as describing deposits in savings banks owned by the testator, if he owns no shares of stock in a bank. *Tomlinson* v. *Bury*, 346.
2. A bequest of "all the mill stock and bank stock remaining in my name after the decease of my said wife" is specific, and not general. *Ib.*
3. If shares of stock, specifically bequeathed by a will, are appropriated to satisfy the claims of the testator's widow, who has waived the provisions of the will in her favor, the legatee is entitled to contribution from other legatees under the will. *Ib.*
4. Under the Gen. Sts. *c.* 92, § 28, (Pub. Sts. *c.* 127, § 23,) if a bequest is made to one of a class, who is a relation of the testator, and the legatee

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dies before the testator, leaving issue surviving the testator, such issue are entitled to the legacy. *Stockbridge, petitioner*, 517.

5. A testator by his will directed that his executor should "lay aside a fund of" a certain amount, of which his widow was to have the income during her life; gave the rest and residue of the estate to his brothers and sisters who might be living at his decease, to be divided equally between them; and provided that, "in case any of the legatees are indebted to me at the time of my decease, such indebtedness shall be deducted from the legacy given him or her, and the balance only paid over to such legatee, and if such indebtedness exceeds the legacy given them, I hereby discharge and release the surplus of such indebtedness." At the decease of the testator some of the brothers were indebted to him on promissory notes bearing interest. *Held*, that the executor was not entitled in his account to charge these brothers with interest after the testator's decease. *Taylor* v. *Taylor*, 239.

6. A testator bequeathed to his wife, in lieu of dower, the income for life of the residue of his estate after the payment of two legacies to herself, and also so much of the principal as should be necessary to give her "a good and comfortable support." With $1100 of her own money, and $2500 paid her from the principal of the trust fund, which was paid to her with the consent of the remainderman, she purchased a house, in which she lived for several years on the income received from her husband's estate. Subsequently, the income became insufficient for her support, and she requested that another part of the principal be paid to her. *Held*, that she was not obliged to dispose of her house and use the proceeds thereof for her support, before her request could be granted. *McKenzie* v. *Ashley*, 577.

7. A testator by his will gave his homestead at W., after the death of his wife, to his two sons, A. and B., in fee; the sum of $300,000 to trustees, in trust to pay the income to his wife during her life, and at her death to pay to such person as she should by her will direct $50,000 of the principal of said sum, and to pay the residue of said principal sum into the residuary fund of the estate; and gave the residue of his estate to trustees, in trust to divide the same into two equal parts for the benefit of his two sons, to subdivide each of such parts into two equal parts, to pay one of the parts, after the subdivision, to each of the sons absolutely, and to hold the other part and pay the income of the same to each son, or his wife or family, during his life, and at his death to such persons as he should by his will direct. A. died before his mother, leaving a will, by the first clause of which he gave to his wife, "except as otherwise provided in the subsequent articles" of the will, the use during life of all the property of which he should die possessed or entitled to, or which he could dispose of, and also the income of all property devised by his father's will of which he could direct the disposition, "not included in the foregoing gift to her of a life estate therein;" and in case any subsequent gift or direction in the will should fail, he gave the use or income of all the property in respect to which the gift or direction should so fail to his wife for life. The third article of A.'s will, after reciting that, whereas by his father's will certain

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property, including his homestead at W., was devised to be held in trust for the benefit of his mother during her life, and that one half of the same or the proceeds thereof might be disposed of by A. subject to his mother's interest therein, directed that his wife, if living at the time of his mother's death, should have the use and enjoyment of that part of said property "which is thus liable to be disposed of by me, or of the income thereof, if my power extends no further than to dispose of the income," until the eldest of his children who survived him attained his majority, at which time, if his wife was still living, his executors were directed "to set apart, out of the said property, a fund for the benefit of said child, consisting of money or securities, or partly of money and partly of securities," to the amount or value of $100,000; and when his second child who survived him attained his majority, his executors were directed "to set apart" for his benefit a "similar" fund of $100,000; and so on in succession as each child attained his majority, until a fund of $100,000 had been set apart for each of his children who should attain majority; and further provided that his wife should continue to have the use and enjoyment during life of the remainder of the property, or its income, after such funds were successively set apart; and that, at any time after his mother's death, his wife might give to any of his children, or their issue, absolutely and indefeasibly, any part of the capital mentioned in this article or in the first article, "except such portion thereof as may have been set apart to constitute any of the funds mentioned in this article, or which it is necessary to retain in order to constitute all of said funds," and that every division subsequently provided for in the will should be made without reference to such gift. By subsequent clauses of the will the testator indicated his intention that his children should share his property equally. A.'s children, of whom there were three, all survived him, and their mother was also living. A.'s mother died after A. The real estate in W., mentioned in the will, was conveyed by A. in fee to his mother before the date of his will. The trustees of A.'s will received from his father's estate the sum of $389,000, of which $125,000 was from the fund of $300,000. *Held*, that the reference in the third article of A.'s will to the fund for the benefit of his mother was so definite as to exclude the construction that he meant to refer to his power over his part of the entire residuary estate of his father. *Held, also*, that the legacies given by the third clause of A.'s will to his children were demonstrative, and not specific; and that a legacy of $100,000 to each of the children must be paid in full, on each child coming of age. *Bradford* v. *Brinley*, 81.

See TRUST AND TRUSTEE, 2.

DISTRICT COURT.

1. If a complaint is received by the justice of a district court, and is sworn to before him, and he issues a warrant, it is to be presumed that he acted under his authority as justice, and that the court was not in session at the time, although the complaint is stated to have been sworn to before the court. *Commonwealth* v. *Brusie*, 117.

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2. If a complaint is received by the justice of a district court, and is sworn to before him, and he issues a warrant, it is not necessary that the clerk should sign the jurat or the warrant, or that the warrant should bear the teste of the justice. *Commonwealth* v. *Brusie*, 117.

See WARRANT.

DIVORCE.

On the hearing of a libel for divorce on the ground of adultery committed with a certain person, evidence of sexual intercourse by the libellee with that person on the morning of her marriage to the libellant, and evidence of acts of familiarity shortly before the marriage, are admissible to show the nature of the intercourse between them shortly after the marriage, when the adultery was alleged to have been committed. *Brooks* v. *Brooks*, 574.

See BENEFICIARY ASSOCIATION, 1.

DOMICIL.

See PAUPER, 4.

DURESS.

See PROMISSORY NOTE, 4.

EASEMENT.

See DEED.

ELECTION.

1. At the trial of an indictment on the St. of 1884, *c.* 299, § 43, for altering a ballot cast for a certain officer at a municipal election of a city, if the evidence shows that the ballot came from the ballot-box which was actually used in the election, it is not necessary to show that the ballot has been cancelled by a mechanical device, as provided in § 10 of the statute. *Commonwealth* v. *McGurty*, 257.
2. An indictment on the St. of 1884, *c.* 299, § 43, for altering a ballot cast at a municipal election of a city for Nelson S. Wakefield for a certain office, by "drawing lines and marks across the words and name Nelson S. Wakefield," is sustained by proof that the words and letters "S. Wakefield" only were so erased by the defendant. *Ib.*
3. A ballot cast, at a municipal election of a city, for a candidate for an office, who is not elected, is a "ballot cast for any officer," within the meaning of those words in the St. of 1884, *c.* 299, § 43, prescribing a penalty for the fraudulent alteration of such a ballot. *Ib.*
4. It is no defence to an indictment on the St. of 1884, *c.* 299, § 43, for altering a ballot cast for a certain officer at a municipal election of a city, that the fraud was discovered, and the ballot was counted and returned for the candidate for whom it was intended to be cast. *Ib.*

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5. At the trial of an indictment on the St. of 1884, *c.* 299, § 43, for altering a ballot cast for a certain officer at a municipal election of a city, secondary evidence of the character of the ballot, which has been destroyed by the city clerk, as required by § 26, is admissible. *Commonwealth* v. *McGurty*, 257.

EMBEZZLEMENT.

The description, in an indictment for embezzlement, of the property embezzled as "thirteen hundred and twenty pairs of shoes, each pair of the value of one dollar, of the property" of a person named. is sufficient. *Commonwealth* v. *Shaw*, 349.

See EVIDENCE, 4.

EMINENT DOMAIN.

1. The charter of a corporation authorized it to convey water by subterraneous pipes to a certain town. A subsequent act authorized it to conduct by subterranean pipes into their own land the waters of certain ponds, for the purposes for which the original charter was granted, and, for said purposes, to "construct, lay down, and maintain any dam or dams, pipes, fountains, or reservoirs, whatsoever, upon and over any land whatsoever." The statute also provided a remedy for any person injured "by the taking the water aforesaid." *Held*, that the corporation had no power to take the land of a third person and build a dam upon it. *Pickman* v. *Peabody*, 480.
2. The St. of 1883, *c.* 163, incorporating a water company, and giving it power to take lands, requires, in § 13, the county commissioners, upon the application of the owner of any land taken, to estimate the damages and require the corporation to give satisfactory security for the payment of all damages and costs which may be awarded such owner; and provides that the right of the corporation to enter upon or use such lands, except for making surveys, shall be suspended until it gives the security so required. *Held*, that the statute made adequate provision for compensation. *Woodbury* v. *Marblehead Water Co.* 509.
3. If a statute giving the right to a water company to take land by the right of eminent domain requires it to file a description of the land taken, "sufficiently accurate for identification," and land is taken in two towns, a description which states the land to be in one town, which does not state the width of the land taken, and which is vague as to the termini, is insufficient. *Ib.*
4. If a statute giving the right to a water company to take land by the right of eminent domain requires it to file a description of the land taken, "sufficiently accurate for identification," it is no objection to a description that it does not state the name of the owner of the land taken. *Ib.*

See EQUITY, 10; RAILROAD, 1, 2; WATERWORKS.

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EQUITY.

I. *Jurisdiction and General Principles.*

1. If a lease of land contains a provision that, "if the premises are for sale at any time, the lessee shall have the refusal of them," and the lessor conveys them to a third person, the lessee cannot maintain a bill in equity, against the lessor and the purchaser, for specific performance of the provision. *Fogg* v. *Price*, 513.

2. If a person attaches mortgaged personal property which is in the possession of the mortgagor under a conditional sale, the terms of which have not been complied with, and, upon the demand of the mortgagee, pays the amount due on the mortgage to the latter, who assigns to him all his right, title, and interest in the mortgage, such person cannot maintain a bill in equity against the mortgagee to recover the amount so paid by him, upon the ground that the payment was made under a mutual mistake as to the validity of the mortgage. *Sears* v *Leland*, 277.

3. A bill in equity, brought by a creditor of A., was submitted to this court upon an agreed statement of facts, which showed that the plaintiff was a creditor of A.; that A. was a *cestui que trust* under a will, which gave him the income of certain property for the support of himself and his son, and provided that the support of the son should be as the father directed; and that all claims against the estate of the testator had been paid, and the executors of the will had a large amount of property in their hands applicable to the bequest to A. and his son; but did not show the amount of the trust fund, nor the income, nor the age and condition of the son, nor what was needed for his support, nor whether the whole or any part had been appropriated for that purpose. *Held*, that the case stated was imperfect, and should be discharged. *Phelps* v. *Phelps*, 416.

4. If a natural watercourse has its source, body, and outlet in a highway, the surveyor of highways of the town in which the highway is situated may, for the purpose of repairing the highway, change the direction of the watercourse, and convey it in an open ditch along the highway; and the fact that the ditch is dug between the centre of the highway and the land on the side, does not entitle the owner of the land, although he owns the fee to the centre of the highway, to maintain a bill in equity against the highway surveyor and the town to abate the nuisance and for damages; but his remedy is under the Pub. Sts. *c.* 52, §§ 15, 16. *Nealley* v. *Bradford*, 561.

5. A trustee pledged to a bank certain shares of stock belonging to a trust estate as security for the payment of a debt due from him to the bank, the certificate and the assignment of the shares showing that it was held in trust. The bank was subsequently organized as a national bank, received the shares, and, at the request of the trustee, sold the shares and applied the proceeds on the debt, the trust estate receiving no benefit therefrom. The trustee was removed and a new trustee appointed in his place. A surety on the original trustee's bond was compelled, in an action upon the bond, brought in the name of the judge of probate, to pay to the trust

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estate the value of the stock. *Held*, that the surety was subrogated to the rights of the new trustee and of the *cestuis que trust*, and could maintain a bill in equity against the national bank to recover the amount so paid by him. *Blake* v. *Traders' Bank*, 13.

6. A. became a surety on a trustee's bond in 1855. The only account rendered by the trustee in the Probate Court was allowed in 1856, but he from time to time rendered accounts to the *cestuis que trust*, and paid to them the balances appearing to be due. In 1858, A. received from the trustee certain security, which was believed by all parties to be ample, and which A. surrendered upon being discharged from the probate bond in 1869. In 1864, the trustee pledged to a bank certain stock belonging to the trust estate as security for the payment of a debt due from him to the bank. The certificate and assignment of the stock showed that it was held in trust. In 1867, the bank, at the request of the trustee, sold the stock and applied the proceeds on the debt, the trust estate receiving no benefit therefrom. The trustee was afterwards removed, and a new trustee appointed in his place. It appeared by the accounts rendered by the original trustee that the stock was held by him, and the *cestuis que trust* did not know of the breach of trust until August, 1877. In November, 1877, before the removal of the original trustee, an action was commenced upon his bond by order of the Probate Court for the benefit of the *cestuis que trust*, which was prosecuted by the new trustee. A. defended the action, on the ground that he had been released as surety, but judgment was rendered against him, in 1882, for the penal sum of the bond; and execution issued for the value of the stock, which was paid by A. In 1884, after such payment, A. brought a bill in equity against the bank to recover the amount so paid by him. *Held*, that the statute of limitations was not a bar to the suit; and that there was not such laches as would prevent A. from recovering. *Ib.*

7. An insurance company, incorporated in another State, issued there to A., who was a resident of that State, a policy of insurance upon his life for a certain sum payable on his death to him, his executors, administrators, or assigns. The policy was known as a tontine policy on the savings fund insurance plan, and was to continue as such for the term of ten years, if A. should live so long. If a person insured under such a policy should die during the tontine period, his estate would receive only the amount of his policy; and if he should fail, during the tontine term, to pay the premiums on his policy, it would be forfeited. Policies of this character were kept in classes according to their tontine periods, and, while the funds of each class were not kept separate, distinct accounts were kept with each class, showing the amount due upon each policy at the expiration of the tontine term. At the expiration of such term, it was provided that "all the surplus or profits derived from such policies on the tontine savings fund insurance plan as shall cease to be in force before the completion of their respective tontine dividend periods shall be apportioned equitably among such policies as shall complete their tontine dividend periods." The holder of the policy then had the option "to withdraw in cash the policy's entire share of the assets, whether in the reserve fund proper or in the

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accumulated surplus," or to use this share in various modes prescribed by the policy for the procurement of additional insurance, or by the purchase of an annuity for the payment of the premiums thereafter becoming due on his policy. The "reserve fund proper" and "accumulated surplus" were made up of the dividends withheld on the premiums of the class during the tontine term, by reason of forfeiture by death or non-payment of premiums within the term. The corporation had a place of business in this Commonwealth, and an agent to receive service of process, but its books and papers were kept in the other State. A. brought a bill in equity in this Commonwealth against the corporation, after the expiration of the tontine period of his policy, for an account. The corporation put in a general appearance, and an answer to the merits, and objected to the jurisdiction of the court for the first time at a hearing on the merits. *Held*, that the defendant had waived any objection to the jurisdiction of the court; that A. was a creditor, and not a member, of the corporation; and that the bill could be maintained without joining the other policy holders of the plaintiff's class. *Pierce* v. *Equitable Assurance Society*, 56.

See BENEFICIARY ASSOCIATION, 2; COLLATERAL SECURITY, 3; CONTRACT, 3.

II. *Pleading and Practice.*

8. If the defendant in a suit in equity files a demurrer to the bill, and also an answer, the court may, under Rule 22 in Chancery, allow the answer to be withdrawn, and may hear the case on the bill and demurrer; and it is not necessary that the demurrer should be again filed. *Fogg* v. *Price*, 513.

9. If an assignee in insolvency sells, by leave of the Court of Insolvency, the estate of the insolvent, and, acting through a third person, becomes the purchaser, and manages the estate for his own benefit and for the benefit of other persons, this court will not entertain a bill in equity, brought by a creditor of the estate against the assignee, under the Pub. Sts. *c.* 157, § 15, to revise an order of the Court of Insolvency dismissing a petition of the creditor seeking to compel the assignee to account for the profits made by him after the sale, unless the persons interested with the assignee in the purchase are made parties. *Northampton Bank* v. *Crafts*, 444.

10. A water company, authorized to take land by the right of eminent domain on filing a description "sufficiently accurate for identification," filed a description and entered upon the land. The owner brought a bill in equity for an injunction against the company, and the company, after it had filed an answer in the case, filed a new description, and set this up in a supplemental answer. The first description was held to be insufficient, and the second to be sufficient. *Held*, that no injunction could issue, but that the bill might be retained for the assessment of damages in respect to the entry before the lawful taking. *Woodbury* v. *Marblehead Water Co.* 509.

See EQUITY, 7.

ESCAPE.

1. In an action against an officer for negligently suffering the escape of a person whom he had arrested upon a writ sued out by the plaintiff, the

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latter is not entitled to recover, as the measure of damages, the amount of his debt against the escaped person, but only such damages as he proves that he has actually sustained. *Slocum* v. *Riley*, 370.

2. In an action against an officer for negligently suffering the escape of a person whom he had arrested upon a writ sued out by the plaintiff, the burden of proof is upon the plaintiff to show that he had a valuable debt against the escaped person, which he has lost by the act of the officer; and this burden is not sustained by showing that he holds a promissory note signed by such person, which, on its face, was at the time of the escape barred by the statute of limitations. *Ib.*

See PLEADING, III.

ESTATES OF DECEASED PERSONS.

See CONTRACT, 5; EXECUTOR AND ADMINISTRATOR; LIMITATIONS, STATUTE OF, 1; PROBATE COURT; WAY, 10.

ESTOPPEL.

A. borrowed a sum of money from B., and gave him a promissory note therefor, secured by a mortgage of personal property which he had formerly owned, but which he had previously conveyed to his wife, through a third person. Afterwards A., not having paid any part of the sum so lent to him by B., borrowed from B. another sum, and gave him a promissory note for the amount of both loans, secured by another mortgage of the same property; and B. surrendered to A. the first mortgage and note. Both mortgages were duly recorded. A. died without having paid any part of the second mortgage, and B. took possession of the property under a foreclosure of the mortgage. A.'s wife was present and heard A. and B. making the arrangements for the first loan, and knew such loan was to be made on the security of a mortgage of her property, but did not inform B. of her claim to the property; and B. did not know of such claim until after A.'s death. In an action by A.'s wife against B. for conversion of the property, the judge ruled that the plaintiff's conduct would create an estoppel against her as to the first mortgage and note, but not as to the second, if the first were in fact paid by the second; and that the giving of the second was *prima facie* payment of the first. *Held*, that the defendant had no ground of exception. *Tracy* v. *Lincoln*, 357.

See BENEFICIARY ASSOCIATION, 2; RECEIPT, 4.

EVIDENCE.

1. A copy of a material paper is admissible in evidence against one who, having the original in his possession, fails to produce it on notice. *Commonwealth* v. *Shurn*, 150.

2. If a car is described in a complaint as the property of a certain street railway company, a witness may properly testify what words and marks were on the car, and another witness may testify that a car with those marks on

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it belonged to the company mentioned in the complaint. *Commonwealth* v. *Carroll*, 403.

3. If a party to an action seeks to justify an act on the ground that he believed that he had a right to do as he did, and his belief is a material issue, he cannot, as of right, strengthen his direct testimony as to what his belief was, by testifying to other facts which would make it likely that he believed as he said. *Marshall* v. *Boston & Albany Railroad*, 164.

4. At the trial of an indictment for the embezzlement of goods of A., it appeared in evidence that A., after the time of the alleged embezzlement, charged the defendant, in a certain conversation, with having spent the money he had collected from the sales of the embezzled property in gambling in stocks. The defendant, in testifying in his own behalf, denied that such a conversation took place; and, on cross-examination, he was asked "if he had been engaged in stock gambling" at a place named. The defendant objected to this question, but was required to answer it. *Held*, that he had no ground of exception. *Commonwealth* v. *Shaw*, 349.

5. At the trial of a complaint for keeping intoxicating liquors with intent to sell the same unlawfully, a police officer testified for the government to facts tending to show that liquor was kept for sale, on the day alleged, in a certain saloon, and to the presence of the defendant there on that day, and also to acts of the defendant at different times before said day, tending to show that he was the keeper of the place. On cross-examination, the witness testified that he had seen A., the defendant's brother, about the saloon before said day, but not so frequently as he had seen the defendant; and that he had never seen any specific acts of A. about the saloon. The witness was then asked if he had not sworn to a complaint to search, charging A. as the owner of liquors at that place; and he admitted that he had, and identified a certified copy of a complaint shown to him as a true copy of a complaint against A., sworn to by the witness on the day named in the present complaint. The defendant offered said certified copy in evidence to contradict the witness; but the judge excluded it. *Held*, that it should have been admitted. *Commonwealth* v. *Snee*, 351.

6. In an action for breach of a covenant against incumbrances in a deed of land from the defendant to the plaintiff, oral evidence is inadmissible to prove that, at the time the deed was given, and as a part of the consideration, the plaintiff promised to pay an assessment then existing upon the land. *Simanovich* v. *Wood*, 180.

7. In an action, the answer to which is a general denial only, for the obstruction of an ancient watercourse, caused by placing a pipe in the defendant's land while the adjoining land was owned by C., the plaintiff's grantor, evidence that C., after his deed to the plaintiff, told a third person that the pipe was an improvement on the old drain, and that he assented to the putting in of the pipe, is inadmissible, although the plaintiff holds the land in trust, and C. is one of the *cestuis que trust;* and evidence that C., when informed by the defendant that he contemplated putting in the pipe, told him to do so and he would bear part of the expense, and that he subsequently paid a part of such expense, is also inadmissible. *Warren* v. *Carey*, 78.

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8. A book of original entries kept by a man who is unable to write, and in which the only entries are straight marks, is admissible in evidence, when supported by his suppletory oath. *Miller* v. *Shay*, 162.
9. If goods are delivered by a servant, and his entries or marks are transferred to the master's account-book, the servant is a competent and necessary witness to support the charges and to prove the delivery. *Ib.*

See ACTION, 4; ADULTERY; APPEAL, 2; BAWDY-HOUSE; CONTRACT, 1; CORPORATION, 1–3; CRUELTY TO ANIMALS, 3; DIVORCE; ELECTION, 1, 5; EXCEPTIONS, 2–5; FORGERY, 1, 2; FRAUDULENT REPRESENTATION, 1–3; HUSBAND AND WIFE, 1, 2, 4; INFANT, 1; INSOLVENT DEBTOR, 2; INSURANCE, 4; INTOXICATING LIQUORS, 1, 5, 6, 8, 9, 14, 16, 18, 22–27, 30; LANDLORD AND TENANT; MASTER AND SERVANT, 1; MORTGAGE, 2; MOTION TO QUASH; PARTNERSHIP; PAUPER, 3, 4; PROMISSORY NOTE, 1, 3; RAILROAD, 11, 12; RECEIPT, 1–3; WAY, 5, 6, 9.

EXCEPTION.

See DEED.

EXCEPTIONS.

1. Under the Pub. Sts. *c.* 153, § 8, a ruling of the Superior Court, sustaining a demurrer to a declaration in an action at law, and ordering judgment for the defendant, may be revised by this court on a bill of exceptions. *McCallum* v. *Lambie*, 234.
2. At the trial of an action, if evidence is admitted subject to another witness being called to prove a certain fact, and the case is closed without the witness being called, and the adverse party makes no request to have the evidence stricken out or the jury instructed to disregard it, he has no ground of exception. *Reeve* v. *Dennett*, 23.
3. Exceptions taken at a trial will not be sustained because incompetent evidence has been admitted to prove a fact which the conceded facts necessarily establish, if this court is not satisfied that the excepting party has been prejudiced by the admission of such evidence. *Hinckley* v. *Somerset*, 326.
4. At the trial of an action for fraudulent representations as to the value of shares of stock in a corporation formed to promote the use in dentistry of a compound invented by the defendant, for which letters patent had been obtained, the plaintiff's evidence tended to show that the defendant's invention was merely a mixture of ingredients, all of which had been used long before in dentistry; and that the compound was worthless for the purpose for which it was intended to be used. The defendant asked the judge to instruct the jury that there was no evidence of a want of novelty in his invention; but the judge refused so to do. *Held*, that the defendant had no ground of exception. *Reeve* v. *Dennett*, 23.
5. If, at the trial of a criminal case, certain evidence for the government is admitted without objection, and is competent for some purposes, it is too late for the defendant to request the judge, in the course of the closing argument for the government, to instruct the jury that the evidence is

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incompetent for any purpose, and that the argument in relation to it should be disregarded by them. *Commonwealth* v. *Clark*, 251.

6. At the trial of a complaint for maintaining a tenement used for the illegal sale of intoxicating liquors in G., a witness for the government testified that he had been hired by a person to go to G., and there buy intoxicating liquors, and obtain evidence for the purpose of making complaints for violation of the Pub. Sts. *c.* 100; that, while in G., he bought intoxicating liquors in the tenement named in the complaint; and that he did this for the purpose of prosecuting the defendant. The defendant asked the judge to rule that "the jury are to look upon the testimony of the witness with the greatest caution and distrust." The judge declined so to rule; and instructed the jury in reference to the witness as follows: "Judge him from his appearance, the plausibility of his story, and his relation to the case. Judge of him as you would any other witness. See if he has any motive to falsify. Look at him in all his relations to the case, and say whether upon the whole you believe his story." *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Ingersoll*, 231.

7. At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the complainant testified that he was employed by a Law and Order League to obtain evidence against liquor sellers, and to prosecute such for illegal sales of intoxicating liquors; that the league furnished him with money to pay expenses; that he asked some sailors to visit the tenement in question with him, and ordered liquors for them, which he paid for out of money furnished by the league. *Held*, that the defendant was not entitled to have the jury instructed that the witness was not entitled to be believed, or that the jury should not convict upon such evidence. *Commonwealth* v. *Moore*, 244.

See ACTION, 4; ADULTERY; BAWDY-HOUSE; COMPLAINT, 5; EVIDENCE, 4; FRAUDULENT REPRESENTATION, 1; HUSBAND AND WIFE, 4; INFANT, 2; INSURANCE, 7; INTOXICATING LIQUORS, 6, 9, 11, 14–16, 18, 19, 27–29; JUROR; LORD'S DAY, 4; MALICIOUS PROSECUTION; MASTER AND SERVANT, 1; MOTION TO QUASH; RAILROAD, 10; TRIAL.

EXECUTOR AND ADMINISTRATOR.

If a sole devisee of a farm is appointed one of the executors of the will of his devisor, the executors, with the assent of the devisee, may occupy the farm for the benefit of the estate, and, while it is so occupied, the products of the farm cannot be taken on attachment as the property of the devisee. *Brigham* v. *Elwell*, 520.

See CONTRACT, 5; DEVISE AND LEGACY, 5; LIMITATIONS, STATUTE OF, 1.

FALSE IMPRISONMENT.

A. was arrested wrongfully, without a warrant, on a charge of felony, by two police officers of a city, and taken to the lock-up. Afterwards the city marshal, having reason to believe that A. was innocent, and having

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made up his mind to release him, sent him, the assistant marshal taking part in such act, from the lock-up to the railroad station in the custody of an officer other than those who arrested him, who released him only when on a train, and just before it started. *Held*, that A. could maintain an action against the five officers jointly for the imprisonment between the lock-up and the train. *Bath* v. *Metcalf*, 274.

See RAILROAD, 10.

FIRE.

See RAILROAD, 7, 8.

FOREIGN LAW.

By the law of the State of New York, as shown by its judicial decisions, an insurance company which by a policy agrees that the surplus or profits derived from policies on the tontine savings fund assurance plan that shall cease to be in force before the completion of their tontine dividend periods shall be apportioned equitably among such polices as shall complete their tontine dividend periods, does not hold such surplus or profits as a trust. *Pierce* v. *Equitable Assurance Society*, 56.

FORGERY.

1. At the trial of an indictment for forging and uttering certain receipted bills of parcels, the persons whose names appeared on the bills as signers testified that they did not sign them, and that the bills did not represent genuine transactions. The defendant, who appeared on the bills as the purchaser of the goods therein mentioned, used the bills, certified upon them that A. was the owner of the goods, received money for them from A., and gave A. his promissory notes for the amount. *Held*, that the evidence was sufficient to warrant a conviction. *Commonwealth* v. *White*, 392.
2. At the trial of an indictment for forging and uttering certain receipted bills of parcels, evidence is admissible, on the question of the defendant's knowledge that the bills were forged, that he fabricated certain other unreceipted bills of a like character, and uttered them to the same person to whom he uttered the receipted bills, by a continuous series of transactions, extending some months later than the latest forgery mentioned in the indictment. *Ib.*
3. An indictment for forgery described the instrument alleged to be forged as an acquittance and discharge for money, and set forth a bill of parcels purporting to be receipted. *Held*, that the instrument was not misdescribed. *Ib.*

See MOTION TO QUASH.

FRAUD.

See LIMITATIONS, STATUTE OF, 3; RECEIPT, 3, 4.

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FRAUDS, STATUTE OF.

A. agreed orally to work for B. for two years, receiving as his compensation instruction in B.'s business, and certain tuition at the end of that time by a third person, to be paid for by B. Before the expiration of the two years, A. was unwilling to remain longer under the contract, and asked that a certain sum be paid him by B. for his services thereafter. This was agreed to. *Held*, that the original agreement was within the statute of frauds, Pub. Sts. *c.* 78, § 1, *cl.* 5, and could not be set up in defence to an action brought against B. by A., on a *quantum meruit*, for services rendered under it. *Freeman* v. *Foss*, 361.

See CONTRACT, 2.

FRAUDULENT REPRESENTATION.

1. In an action for fraudulent representations as to the value of shares of stock in a corporation formed to promote the use in dentistry of a compound invented by the defendant, a dentist, the plaintiff's evidence tended to show that the compound was worthless for the purpose of allaying pain, for which it was intended to be used. The defendant was allowed to introduce the evidence of a number of his patients, who testified that the defendant's operations upon their teeth, using his invention, were practically painless, whereas similar operations before had been very painful. *Held*, that the plaintiff had no ground of exception. *Reeve* v. *Dennett*, 23.
2. In an action for fraudulent representations as to the value of shares of stock in a corporation, if there is evidence tending to show that the defendant made such false representations at a certain time for the purpose of inducing the plaintiff to buy some of the stock, it cannot be said, as matter of law, that such representations may not have continued to operate in the plaintiff's mind eleven months afterwards, and may not have induced him to accept more stock, even if he had become a director in the corporation and had acquired independent means of knowledge in the mean time, if in fact he continued to rely upon the defendant's statements in dealing with him. *Ib.*
3. In an action for fraudulent representations, if there is evidence tending to show that the defendant made false representations to the plaintiff as to the defendant's ownership of certain land in order to induce the plaintiff to advance money to the defendant, it cannot be said, as matter of law, that the representations were made good by a purchase of the land by the defendant before the plaintiff had acted upon the representations, if in the purchase the greater part of the price was secured by a mortgage on the land. *Ib.*
4. In an action for fraudulent representations, alleged to have induced the plaintiff to take certain shares of stock and to borrow a sum of money, with a pledge of the stock as collateral security, which he paid to the defendant, the plaintiff's failure to prove that he pledged stock to secure the loan to him is not material, if he proves the defendant's fraud and his own advance of money on the faith of it. *Ib.*

See EXCEPTIONS, 4.

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GAMING.

See HUSBAND AND WIFE, 3, 4.

GOODS SOLD AND DELIVERED.

See EVIDENCE, 9.

GUARANTY.

See PROMISSORY NOTE, 5.

GUARDIAN AND WARD.

See BENEFICIARY ASSOCIATION, 2.

HIGHWAY.

See WAY.

HORSE RAILROAD.

See INDICTMENT; RAILROAD, 9.

HOUSE OF ILL-FAME.

See BAWDY-HOUSE; COMPLAINT, 6, 7; HUSBAND AND WIFE, 3, 4.

HUSBAND AND WIFE.

1. Evidence that a husband had the general management of premises belonging to his wife, that he employed A. to perform labor upon a house on the land, that the wife knew that A. was working on the house, and that she gave him directions as to parts of the work, will justify a finding that the husband, in employing A., acted as the duly authorized agent of the wife. *Wheaton* v. *Trimble*, 345.
2. At the trial of a complaint against a married woman for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, she cannot, under the Pub. Sts. *c.* 169, § 18, *cl.* 1, testify to a private conversation with her husband, who managed the tenement as her agent, in relation to instructions which she gave him about the conduct of the business, for the purpose of showing that she acted in good faith in giving them. *Commonwealth* v. *Hayes*, 289.
3. If a husband takes no part in keeping a tenement owned by his wife, and used by her as a house of ill-fame, for illegal gaming, or for the illegal sale and illegal keeping of intoxicating liquors, he cannot be convicted of so keeping it, if his wife's acts are done without his consent and against his will; and whether he used all practicable means to prevent her from so keeping the tenement is relevant only on the question of his consent or want of consent. *Commonwealth* v. *Hill*, 305.

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4. At the trial of an indictment for keeping and maintaining a tenement used as a house of ill-fame, for illegal gaming, and for the illegal sale and illegal keeping of intoxicating liquors, it appeared that the premises in in question were owned and conducted by the defendant's wife; and that he lived there with her, and was present during, and knew of, her illegal acts. The defendant offered evidence to show that, "from time to time during five years prior to the finding of the indictment, he had ordered, directed, persuaded, and used all reasonable and practicable means in his power to prevent his wife from doing any of the acts charged, and that his wife told him the property was hers and she would do as she pleased." The judge excluded any evidence on this point relating to any period prior to the first date named in the indictment. *Held*, that the defendant had good ground of exception. *Commonwealth* v. *Hill*, 305.

See BANKRUPT; CONTRACT, 1; INTOXICATING LIQUORS, 28, 29; PRINCIPAL AND SURETY; PROMISSORY NOTE, 4; TRUSTEE PROCESS.

ICE.

See LEASE, 3.

INDICTMENT.

An allegation in an indictment that the defendant "wilfully did throw a certain missile, to wit, a stone," at a street-railway car, is not sustained by proof that he threw only a billet of wood. *Commonwealth* v. *McCarthy*, 575.

See ELECTION, 1, 2, 4, 5; EMBEZZLEMENT; FORGERY, 3; VARIANCE.

INFANT.

1. In an action by an infant to recover money paid by him for an article of merchandise, there was evidence that the father of the infant made a demand for the money and caused the action to be brought, and that the infant was present when the demand was made, and returned the article to the defendant. *Held*, that the evidence would warrant a finding that the plaintiff had rescinded the contract. *Held, also*, that the fact that the infant testified at the trial that he was willing to stand by the contract, and did not wish the action prosecuted, was immaterial. *Pyne* v. *Wood*, 558.

2. In an action by an infant to recover money paid by him for a bicycle, on the question whether the bicycle was a "necessary," it appeared that the plaintiff, a boy seventeen years of age, lived with his father, and worked in a shoe shop, a mile from his father's house; that he went home for his dinner, and was allowed to be absent an hour. The judge who tried the case without a jury found for the plaintiff. *Held*, that no error of law appeared. *Ib.*

See ACTION, 6; INTOXICATING LIQUORS, 2, 31, 32, 34; WAY, 4.

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INNKEEPER.

If a guest at an inn, upon retiring for the night, locks the door of his room, but omits to fasten it with a bolt, such omission, if the existence of the bolt is unknown to him, and his attention is not called to it by the innkeeper, is not such negligence as will preclude him from maintaining an action against the innkeeper for the value of his property stolen from the room during the night. *Spring* v. *Hager*, 186.

INSOLVENT DEBTOR.

1. The Pub. Sts. *c.* 157, § 112, authorize proceedings in insolvency against a debtor whose real estate has been attached on mesne process in an action of contract for the sum of $100 or upwards, founded on a demand in its nature provable against the estate of an insolvent debtor, if the defendant does not before the return day of the writ dissolve the attachment, although it appears from the return of the officer that the attachment was a general one, if the defendant then had in fact a record title to real estate in the county in which the attachment was made. *Taunton Bank* v. *Stetson*, 366.
2. A., the maker of a promissory note indorsed by B., assigned all his property to trustees for the benefit of his creditors, by an indenture, which was also executed by C., the holder of the note, and by other creditors. The indenture provided that a holder of any promissory note to which A. was a party, and upon which any other person was absolutely or contingently liable, did not, by signing the indenture, release or discharge such other person, or in any manner impair his liability thereon; but every such holder fully reserved all rights and remedies thereon, and the same might be as fully enforced as if the indenture had not been executed. *Held*, on a petition by C. against B., under the Pub. Sts. *c.* 157, § 112, to have B. adjudged insolvent, and a warrant issue against his estate, that C. was a creditor of B., within the statute, and that evidence offered by B., that the property received by the trustees of A. was more than enough to pay all A.'s liabilities, was immaterial. *Ib.*
3. It is not necessary or proper that the judge of insolvency should be made a party to an appeal from his decision dismissing a petition to have a person adjudged insolvent and a warrant issue against his estate. *Ib.*
4. After a petition to the Court of Insolvency, to have a person adjudged insolvent and a warrant issue against his estate, has been dismissed, it is not necessary that the petitioner should apply to that court for a further hearing before bringing his petition to this court, under the Pub. Sts. *c.* 157, § 15. *Ib.*
5. If a creditor of an involvent estate proves a valid claim against it, the fact that he subsequently participates with the assignee of the estate in a transaction prejudicial to the rights of the creditors affords no ground for expunging his claim, under the Pub. Sts. *c.* 157, § 35. *Northampton Bank* v. *Crafts*, 444.

See CONTRACT, 3; EQUITY, 9.

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INSURANCE.

I. *Accident.*

1. In an action upon a policy of insurance against bodily injuries "effected through external, violent, and accidental means," and against loss of life resulting from such injuries within ninety days, and containing a condition that immediate written notice shall be given to the company of any accident and injury for which claim is made, and that, unless affirmative proof of death or duration of disability is so furnished within seven months from the time of such accident, all claims based thereon shall be forfeited, the declaration set forth a contract made by the policy; and alleged the death of the assured from bodily injury "effected through external, violent and accidental means," which injury occasioned his death within ninety days thereafter, and that due proof of such death and injuries was given to the company. The answer contained a general denial, and alleged that, if the death of the assured should be proved to have occurred within the term of the policy, "he did not die in consequence of external, violent, and accidental means." *Held*, that the defence that the immediate written notice of the injuries required by the policy had not been given was not open under the answer. *Coburn* v. *Travelers' Ins. Co.* 226.
2. In an action upon a policy of insurance against bodily injuries "effected through external, violent, and accidental means," and against loss of life resulting from such injuries within ninety days, and containing a condition reciting that "this insurance does not cover disappearances," and enumerating a large number of injuries and death from a variety of causes as not covered by it, including "intentional injuries inflicted by the insured or any other person," the declaration set forth a contract made by the policy; and alleged the death of the assured from bodily injury "effected through external, violent, and accidental means," which injury occasioned his death within ninety days thereafter. The answer denied every material allegation of the declaration; and alleged that, if the death of the assured should be proved to have occurred within the term of the policy, "he did not die in consequence of external, violent, and accidental means." *Held*, that the defence that the injuries sustained by the assured were intentional was not open under the answer. *Ib.*

II. *Life.*

See EQUITY, 7; FOREIGN LAW.

III. *Fire.*

3. If, by the terms of a policy of insurance against loss by fire, the policy is to be void on the removal of the property insured without the written assent of the company issuing the policy, an agent of the company has no power by an oral agreement to waive this provision. *Putnam Tool Co.* v. *Fitchburg Ins. Co.* 265.
4. A policy of insurance against loss by fire contained a provision that the policy should be void on the removal of the property insured without the

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written assent of the company issuing the policy. The property insured was removed without such assent, and was afterwards destroyed by fire. After the fire, and when the officers of the company knew of the removal, they met the adjusters of the various companies in which the property was insured. The amount of the loss was discussed at this meeting, and a reduction of the sum covering the loss was agreed to by the insured, on the supposition that the company issuing the policy in question would pay its share of the loss. Subsequently the president of the company said that the loss would have been paid if the amount insured by his company had been no greater than that of other companies. *Held*, in an action on the policy, that the evidence was not sufficient to entitle the plaintiff to go to the jury on the question whether the officers of the company had waived the provision in the policy, or were estopped to claim the benefit of it. *Putnam Tool Co.* v. *Fitchburg Ins. Co.* 265.

5. A policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 139, against loss by fire, upon a house, provided that it should be void if the property should be "sold." During the term of the policy the assured conveyed the property to A. by a deed, absolute in form and duly recorded. On the same day A. executed to the assured a bond to reconvey the property, on the assured indemnifying A. against loss on account of his becoming a surety on a recognizance in a criminal prosecution. This bond was not recorded, and the company issuing the policy had no knowledge of it. Subsequently, A., with the knowledge of the assured, and for his benefit, mortgaged the property insured to C. by an instrument not under seal. After a loss by fire occurred, the mortgage was discharged, and the property was conveyed by A. to the assured, the condition named in the bond having been performed. *Held*, that the property had not been "sold" by the assured, and that he could maintain an action on the policy. *Bryan* v. *Traders' Ins. Co.* 389.

6. A policy of insurance against loss by fire was issued by an insurance company to a corporation, payable to "A., trustee for mortgage bondholders." By the terms of the policy it was to become void, if, without the assent of the insurer, any change should take place in title or possession. On the same day the insurance company reinsured one half of its risk, and received a policy made out on a printed blank form adapted to insurance on property directly. By the printed provisions a sale or transfer of the property insured, or the entry of a decree of foreclosure, without the consent of the insurer, terminated the risk. Attached to the policy was a slip, also in print, as follows: "This policy to be subject to the same risks, conditions, valuations, indorsements, privileges, assignments, and mode of settlement as are or may be assumed or adopted by" the first company, "and the loss, if any, payable *pro rata*, at the same time and in the same manner as by said company." Subsequently, the mortgage was foreclosed, and the property sold. It was bought by a person representing the bondholders, to whom the first policy was assigned, with the assent of the company issuing it; but no notice was given to the company reinsuring the risk. A loss by fire afterwards occurred, and was paid by the first company. *Held*, that it could maintain an action on the policy

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of reinsurance for the amount thereby insured. *Manufacturers' Ins. Co* v. *Western Assur. Co.* 419.

7. A policy of insurance was issued, in the form prescribed by the Pub. Sts. *c.* 119, § 139, against loss by fire, upon chattels, while contained in a certain house "occupied the year around." A loss occurred in May, and during the previous October, and for a few days before and after, the house was unoccupied. The judge instructed the jury that the plaintiff must satisfy them that the building containing the property answered the description in the policy at the time when the contract was made and at the time of the fire, and the attention of the jury was called to the nature of the occupancy as a circumstance to be considered in determining whether the house could be called a building "occupied all the year around." *Held*, that the instructions were sufficiently favorable to the defendant, and that the action could be maintained. *Ring* v. *Phœnix Assur. Co.* 426.
8. Under the Pub. Sts. *c.* 119, §§ 138, 139, 181, a misrepresentation made in obtaining a policy of fire insurance is to be deemed material, if the matter misrepresented increases the risk of loss, although not made with intent to deceive. *Ib.*
9. In an action on a policy of insurance against loss by fire, an overestimate of the value of the property lost in the proof of loss, if not made fraudulently, will not avoid the policy, or render the proof of loss insufficient to satisfy a condition in the policy requiring the insured to render a statement of his loss in writing. *Towne* v. *Springfield Ins. Co.* 582.
10. If a policy of insurance against loss by fire requires that, in case of loss, the insured shall make a statement in writing, "setting forth the value of the property insured," the property insured need not be set forth in detail. *Ib.*
11. A provision in a policy of insurance against loss by fire, that all other insurance on the property insured shall be set forth in detail in the proof of loss, is complied with by inserting in such proof a copy of the description contained in another policy of insurance on the same property. *Ib.*
12. If goods in two buildings are insured, in separate amounts, against loss by fire, by a policy providing that the insured, in case of loss, shall make a statement in writing, setting forth the value of the property insured, and the purposes for which and the persons by whom the building containing the property insured was used, a statement in which the insured claims payment for all the property insured, but in which he refers to one of the buildings only, is insufficient. *Ib.*

INTEREST.

See DEVISE AND LEGACY, 5.

INTOXICATING LIQUORS.

1. At the trial of a complaint against A. for the sale of intoxicating liquor to B. at W., there was evidence that B. asked C. to get him some liquor

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when he went to M.; that the quantity ordered was delivered to B. at W.; and that he then paid for it and took a receipt for the money, which receipt purported to be a bill from A., signed in his name by D. There was also evidence that, at the trial in the district court, when A. was present, his counsel took possession of the receipt, and claimed the right to retain it, and refused to produce it, on notice, at the trial in the Superior Court. *Held*, that there was sufficient evidence to sustain the complaint *Commonwealth* v. *Shurn*, 150.

2. A complaint cannot be maintained for the illegal sale of intoxicating liquor to a minor, unless the fact of such minority is averred. *Commonwealth* v. *Fowler*, 398.
3. A complaint for the illegal sale of intoxicating liquor to A. is maintained by proof that A. was acting as the agent of an undisclosed principal. *Ib.*
4. At the trial of a complaint for selling intoxicating liquor to A., there was evidence that A. was a boy eleven years of age; that, at the time alleged, acting as the agent of his father, he ordered the liquor in question and paid for it, and the defendant delivered it at the house where the boy and his father lived; and that he did not disclose his agency to the defendant on this occasion, or on similar previous occasions. The defendant asked the judge to rule that there was no sufficient evidence of a sale and delivery to A. The judge refused so to rule, and instructed the jury that if the boy did not disclose, in any manner, to the defendant, at the time of the alleged sale, that he wanted the liquor for his father, the sale would be to the boy. *Held*, that the instruction might be construed to mean that, if the father was not in any manner disclosed or known at the time as the principal, the charge of a sale to the son was supported by the evidence; and that the defendant had no ground of exception. *Ib.*
5. At the trial of a complaint for selling intoxicating liquor to A., there was evidence that A., who was a boy eleven years old, had given to him by his father a sum of money to buy liquor for the father; that the boy met the defendant on the street, and ordered and paid for the liquor, which the defendant subsequently delivered at the house where the boy and his father lived; and that the boy did not on this occasion, or on similar occasions, inform the defendant that he was acting as his father's agent. *Held*, that the evidence would warrant the jury in finding that there had been a sale and delivery to A. *Ib.*
6. On a complaint for selling intoxicating liquors, there was evidence that there was a delivery of liquor by the steward of a club to one of the members of the club, who paid for it, in a city which had voted to grant licenses to sell intoxicating liquors; and books purporting to be the records of the club were put in evidence. The government contended that the club was organized to defraud the city of a license fee; and that the books and records were not genuine, were founded in fraud, and were gotten up to cover the illegal acts of the defendant. The judge instructed the jury, as requested by the defendant, that if the club was a *bona fide* club and the liquors owned in common by the members, and the members on receiving liquors gave money in return, it would not be a sale within the meaning

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of the statute; and that, "if two or more persons unite in buying intoxicating liquor, and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial. If they intend in this manner to obtain intoxicating liquor to drink without thereby subjecting any person to the penalties of the statute, they still act with impunity." The judge further instructed the jury, against the objection of the defendant, as follows: "It is not a violation of law if they unite in good faith in dividing it. If two persons buy a gallon of liquor, and divide it among themselves, they act with impunity; but if this is a mere device to cheat the government out of its license fee, and prevent the due execution of law, it is not a protection, and the defendant does not act with impunity." *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Ewig*, 119.

7. If a dealer in intoxicating liquors, having a license authorizing him to sell such liquors only at his shop, sends a wagon containing liquors to his regular customers, and authorizes the driver to let such customers have what they want from time to time, a delivery of liquor at the shop of a customer by the driver, in pursuance of an order then and there given, is an illegal sale; and the dealer cannot maintain an action to recover the price of the liquors delivered, although he had previously, at his own shop, made an agreement with the customer to supply him in this manner with such liquors as he should from time to time require. *Murphy* v. *McNulty*, 464.

8. At the trial of a complaint for keeping intoxicating liquors at S., with intent unlawfully to sell the same, if it appears that the defendant's premises are situated partly in S. and partly in C., an adjoining city, evidence that intoxicating liquors were found by an officer, who searched the premises, in that part situated in C., is admissible upon the question of the intent with which the defendant kept liquors in that part of the premises situated in S. *Commonwealth* v. *Downey*, 377.

9. At the trial of a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, the defendant admitted that a license issued to him to sell such liquors had been revoked by the board of aldermen granting it, upon proof satisfactory to the board that he had violated the conditions thereof. The defendant, for the purpose of showing that said revocation was invalid, on the ground that he was afforded no reasonable opportunity to be heard, offered to show that he was cited to appear before the board on a certain evening, to attend a hearing upon the revocation of his license; that on that evening he was confined to his bed by reason of illness, and was unable to attend the hearing; that he was represented by counsel, who presented to the board the certificate of his physician of his physical inability to be present, and requested a continuance of the hearing; that thereupon the city marshal stated to the board, but not under oath, that the defendant was in his saloon attending to business that afternoon, which statement the defendant offered at the trial to prove was incorrect; that it was then voted to proceed with the hearing; that the board refused his request for a continuance, upon which his counsel left; and that, after a hearing, the board revoked the license. The judge

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ruled that, upon these facts, if proved, the revocation was valid. *Held*, that the ruling was right. *Commonwealth* v. *Wall*, 216.

10. It is no defence to a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, that the liquors were upon the defendant's premises by mistake, and he did not know that they were intoxicating, if he intended to sell them, and they were in fact intoxicating. *Commonwealth* v. *Savery*, 212.

11. On a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, there was evidence for the government that the defendant had in his possession lager beer containing more than three per cent of alcohol, by volume, at sixty degrees Fahrenheit. The defendant testified that he ordered three per cent beer; that the lager beer was left by mistake; that he did not know that he had any lager beer; and that, if he had found, when he opened the beer, that it was lager beer, he should not have sold it. He asked the judge to instruct the jury, that, if they found that the lager beer was there by mistake, that he did not know it was lager beer, and that he did not intend to sell the same when the opportunity presented itself to him to know its true character and when he did know the true nature of it, and that he would have found out its true nature when he attempted to sell it, he could not be convicted. *Held*, in the absence of evidence that lager beer could be distinguished from three per cent beer in any manner except by analysis, and in the absence of evidence that the defendant intended to make an analysis, the request for instruction was rightly refused. *Ib.*

12. A complaint on the Pub. Sts. *c.* 101, § 6, alleging the keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, need contain no other allegation negativing an authority to keep or sell intoxicating liquors. *Commonwealth* v. *Brusie*, 117.

13. A complaint on the Pub. Sts. *c.* 101, §§ 6, 7, alleging that the defendant, at a place and on a day named, and on divers other days and times between that day and the day of making the complaint, "is guilty of keeping and maintaining a certain tenement, then and there used for the illegal keeping and illegal sale of intoxicating liquors," is sufficient. *Commonwealth* v. *Gallagher*, 104.

14. At the trial of a complaint for keeping intoxicating liquors, with intent to sell the same unlawfully, the only issue in dispute was whether the defendant was the proprietor of a certain saloon. A police officer testified to an admission of the fact by the defendant at a certain interview when no one else was present. The defendant and two other witnesses testified to a conversation between the defendant and the police officer differing essentially from the version given by the latter. The defendant contended in his argument to the jury that the officer was mistaken. The district attorney contended that, if the jury acquitted the defendant, they would brand the officer as a perjurer. The defendant asked the judge to instruct the jury that it was not necessary for the jury to disbelieve the officer in order to acquit; that, if all the evidence left their minds in doubt as to what was said, the defendant was entitled to the benefit of it. The judge did not instruct the jury as requested, but instructed them that the

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material allegations of the complaint were to be proved beyond a reasonable doubt, and that they were to consider the intelligence of the officer, and whether he understood and interpreted the conversation correctly; and that they were not responsible for the effect, if any, of their verdict upon witnesses. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Christie*, 232.

15. At the trial of a complaint against A. and B. for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, evidence was introduced showing that both defendants had been seen in and about the premises in question. The defendants contended that one defendant was in the employ of the other; and asked the judge to rule that, "if B. was employed by A. as an assistant, on wages, and did not act in the absence of A., nor at any time have sole charge of the premises, he cannot be convicted." The judge declined so to rule; but instructed the jury that, if B. assisted A. in keeping and maintaining the premises as a nuisance, he would be liable to conviction upon the complaint. *Held*, that B. had good ground of exception. *Commonwealth* v. *Murphy*, 250.

16. At the trial of a complaint against A. for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, A. testified that he had nothing to do with the management or control of the premises, but that they were let to B., who alone conducted them during the period named in the complaint; that he, A., had never had any interest in any sale of liquor, or at any time, on these premises. On cross-examination, the district attorney asked A. if he had had anything to do with keeping it before the first day named in the complaint; and A. answered that he had not. The district attorney was then allowed to put in evidence tending to contradict A. on this point, and to show expenditures for purchases for the premises for the four months preceding the first day named in the complaint, and was allowed to comment on this evidence in his argument to the jury. *Held*, that A. had no ground of exception. *Commonwealth* v. *Clark*, 251.

17. On a complaint for keeping and maintaining a tenement used for the illegal keeping and sale of intoxicating liquors, if illegal sales on two different days are proved, the element of the continuing use of the tenement for that purpose, which would not necessarily follow from one sale, may be inferred by the jury. *Commonwealth* v. *McNeff*, 406.

18. At the trial of a complaint for keeping and maintaining a tenement used for the illegal keeping and illegal sale of intoxicating liquors, it appeared that the defendant had a license of the first class to sell intoxicating liquors. There was evidence of sales made by the defendant to a person known by him to be a drunkard, and that at the trial of another case the defendant testified that he knew that this person had frequently been intoxicated, but had never sold to him when intoxicated, but only when he was not intoxicated. The judge instructed the jury that they must be satisfied that the defendant knew that this person was a drunkard, or that he had been intoxicated within six months. The judge further instructed the jury that evidence of sales to a person who was a drunkard or a person

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intoxicated, and known to the defendant to be intoxicated, would be evidence on which the jury might convict, but omitted to state the requirement of the Pub. Sts. *c.* 100, § 9, *cl.* 4, that the person must be "known to be a drunkard." The judge's attention was not called to this omission. *Held*, that the defendant had no ground of exception to the rulings given. *Commonwealth* v. *McNeff*, 406.

19. At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, evidence of illegal sales of such liquors was admitted, and the defendant's bill of exceptions did not show whether they were made during the time included in the complaint. *Held*, that the defendant showed no ground of exception. *Ib.*

20. At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, if the defendant has an innholder's license and also a license of the first class for the sale of intoxicating liquors, and the evidence for the government tends to show that the defendant sold intoxicating liquors on the Lord's day to several persons who went into his premises for the purpose of procuring and drinking such liquors, such persons are not "guests," within the meaning of the Pub. Sts. *c.* 100, § 9, *cl.* 2; and the defendant is not entitled to have the jury instructed as to the rights of an innholder to sell to his guests. *Commonwealth* v. *Moore*, 244.

21. If a person licensed to sell intoxicating liquors places or maintains curtains in the windows upon the licensed premises, in such a way as to interfere with a view of the business conducted thereon, or of the interior thereof, it is a violation of his license; and it is immaterial for what purpose he maintains the curtains. *Ib.*

22. At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, there was evidence tending to show that the tenement in question was visited within the time alleged, and the defendant was found behind a bar, where cigars and hop beer containing less than three per cent of alcohol were kept; that samples of dirty water were taken from a tank under the bar near where the defendant stood, and from the bottom of an ice-chest, which samples, on analysis, were found to contain more than three per cent of alcohol; that on each visit the defendant was seen to go to the tank and go through the motion of rinsing a two-quart can, which was kept under the bar; that an empty can was found in the ice-chest which smelt of whiskey; and that the sample of the water taken from the bottom of the ice-chest also smelt of whiskey. *Held*, that the evidence was competent; and that it was sufficient to warrant a verdict of guilty. *Commonwealth* v. *Boyle*, 373.

23. On a complaint for keeping and maintaining a tenement used for the illegal keeping and sale of intoxicating liquors, it is competent to prove the discovery of liquor in the defendant's bar-room, and also the circumstances of the discovery. *Commonwealth* v. *Locke*, 401.

24. On a complaint for keeping and maintaining a tenement used for the illegal keeping and sale of intoxicating liquors, evidence that the defendant's bar-keeper endeavored to conceal intoxicating liquor, while a search

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was being made under a search-warrant, is admissible, although the defendant was absent at the time, and there was evidence that he had no knowledge that intoxicating liquor was sold there. *Commonwealth* v. *Locke*, 401.

25. On a complaint for keeping and maintaining a tenement used for the illegal keeping and sale of intoxicating liquors, the jury may infer that intoxicating liquor is being kept for the purposes of unlawful sale from the fact of its presence in the tenement, and an attempt by the defendant's servant to conceal it. *Ib.*

26. At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, evidence of a conversation between a witness for the government, who has testified that he was active in the prosecution, and the complainant, who is not a witness, in relation to the matter, is properly excluded. *Commonwealth* v. *Brownell*, 319.

27. At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, it appeared that the tenement was a hotel, with a bar-room in the basement; that the bar-room could be entered by passing through the office of the hotel and going down stairs, and also by entering a door in the basement. Two officers, who testified that they made a seizure of liquors in the bar-room, stated that, when they passed through the office, they saw the defendant there. The sheriff of the county testified that he had seen the defendant about the office, looking at the books, writing, and giving directions. Another witness testified that he had seen the defendant about the office, giving directions, and had seen him direct a servant to take a card to a guest's room. The defendant did not testify as a witness. The judge, after instructing the jury as to the defendant's right not to testify, instructed them as follows: "If you find, upon the question of the proprietorship of that hotel, he had it in his power to produce witnesses here not known to the government, who could give you further light upon that question, and he does not choose to do it, you may take that fact into consideration when you come to consider whether there is any reasonable theory consistent with his non-proprietorship of that hotel and with the evidence. I do not mean to say that his failure to produce the witnesses here will fill up any gap, if you find any, in the evidence of the Commonwealth, but only that when you are to consider the reasonableness of any explanation of his acts here, if any have been proved, with regard to that hotel, consistent with his not being the proprietor of it, you may take into consideration the fact whether or not there is other evidence in his power upon that question which he could place before you." *Held*, that the defendant had no ground of exception. *Ib.*

28. At the trial of a complaint against a married woman for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the evidence tended to show that the defendant's husband conducted the tenement, which was a hotel, as her agent; that she did not live on the premises; and that he, acting according to her wishes, instructed the bar-keeper not to sell liquors in violation of her

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license. The judge instructed the jury as follows: "In considering whether the defendant acted in good faith in giving instructions as to the conducting of her business in the hotel, and intending that her instructions should be obeyed, the jury may consider the defendant's relations to and practical connection with the business of her hotel, her means and opportunities of knowing how her business was conducted there in the matter of selling intoxicating liquors, and what information her interest and duty in that matter would reasonably induce her to seek and obtain. An instruction would not be given in good faith, which the person giving it, from the nature of the matter to which that instruction applied, and the character of the persons to whom it was given, could not reasonably expect to be obeyed, and which he did not follow by any supervision or care, for the purpose of ascertaining if that instruction was obeyed." *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Hayes*, 289.

29. At the trial of a complaint against a married woman for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the evidence tended to show that the defendant's husband conducted the tenement, which was a hotel, as her agent; that she did not live on the premises; and that he, acting according to her wishes, instructed the bar-keeper not to sell liquors in violation of her license. The judge instructed the jury as follows: "Nothing to the contrary appearing, the natural and just inference from a sale, by a servant employed in his master's shop, of his master's goods, there kept for sale, would be that such a sale was authorized by the master. If a sale of intoxicating liquor was made in the hotel, during the time alleged in the complaint, by any person employed by the defendant to conduct her business at that hotel, without the defendant's knowledge, and really in opposition to her will, and the defendant in no way participated in, approved, or countenanced such sale, and this is clearly shown by the defendant, the defendant would not be responsible for such sale." *Held*, that the defendant had good ground of exception. *Ib.*

30. At the trial of a complaint, under the Pub. Sts. *c.* 100, § 17, alleging that the defendant brought into a certain city spirituous and intoxicating liquors, he having reasonable cause to believe that such liquors were intended to be sold in violation of law, the evidence showed that the defendant brought into the city from a certain town various packages of liquors, some of which were consigned to one D. *Held*, that evidence of a police officer of the city, as to his search of D.'s place three days before the date of the defendant's alleged offence, as to what he found there, and as to D.'s acts and conduct, was competent. *Held*, *also*, that it was competent for the government to show, on the issue whether the defendant had reasonable cause to believe that D. intended to sell such liquors in violation of law, that, on the day of the alleged offence, D. was generally known and reputed to be a dealer in intoxicating liquors at his place. *Commonwealth* v. *Harper*, 100.

31. An action on the Pub. Sts. *c.* 100, § 24, for sales of intoxicating liquor to the plaintiff's minor children, is an action for a penalty or forfeiture,

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within *c.* 197, § 4, and, if brought more than one year after such sales, is barred by the latter statute. *O'Connell* v. *O'Leary*, 311.

32. The delivery of intoxicating liquor to a minor, in pursuance of a sale to his mother, and for her use, is not a sale to the minor, within the Pub. Sts. *c.* 100, § 24. *Ib.*

33. A notice in writing, signed by I. T., Jr., the son of a person having the habit of drinking intoxicating liquors to excess, to a seller of such liquors, as follows: "I forbid you selling or delivering liquor to I. T.," is a sufficient compliance with the Pub. Sts. *c.* 100, § 25. *Taylor* v. *Carroll*, 95.

34. An adult son, although not dependent for support on his father, is a "child," within the meaning of the Pub. Sts. *c.* 100, § 25, and may maintain an action against a person selling the father spirituous or intoxicating liquors, after a notice in writing by the son, under the statute, forbidding him so to sell. *Ib.*

See APPEAL, 3; COMPLAINT, 5–7; EVIDENCE, 5; EXCEPTIONS, 6, 7; HUSBAND AND WIFE, 2–4; JUROR; SEARCH-WARRANT; TRIAL JUSTICE.

JUDGMENT.

1. *It seems*, that the Pub. Sts. *c.* 171, § 1, providing that "the court may enter up judgment upon default at any time after four days from the day of default," do not apply to proceedings upon a complaint under the bastardy act, Pub. Sts. *c.* 85; and that a judgment in such proceedings is not irregular because entered on the day of a default. *Keith* v. *McCaffrey*, 18.

2. If the respondent in a bastardy complaint appears and answers, and is defaulted because not present when the case is called for trial, and judgment is entered on the default, and he did not intend to make default, and his absence is reasonably explained, and if, at a hearing upon his motion that the judgment be vacated, made at the same term of the court at which the judgment was entered, he shows circumstances from which the judge finds that the judgment ought to be vacated and a trial allowed, it is within the authority of the judge to find that the judgment was rendered by mistake, and to bring forward the case and vacate the judgment. *Ib.*

See TRIAL JUSTICE.

JURISDICTION.

See APPEAL, 2; COMPLAINT, 2; EQUITY, 7; RECORD, 2; TRIAL JUSTICE.

JUROR.

At the trial of a complaint for a violation of the law relating to intoxicating liquors, no exception lies to the refusal of the judge, after having put to the jurors the questions provided for by the Pub. Sts. *c.* 170, § 35, to ask them whether they are members of, or contributors to, any society or association having for its object the enforcement of the laws relating to intoxicating liquors. *Commonwealth* v. *Burroughs*, 242.

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LACHES.

See EQUITY, 6.

LANDLORD AND TENANT.

In an action for personal injuries occasioned to the plaintiff by falling into a cesspool upon premises owned by the defendant, and occupied by the plaintiff as a tenant at will, there was evidence that the plaintiff did not know of the existence or location of the cesspool; that it was in the yard she had hired and was entitled to use; that it was covered with boards, over which were from four to six inches of earth on which grass and weeds were growing; that it presented the same appearance as the rest of the yard; that it had never been pointed out to her; that it was where she passed over it in her use of the yard; that the boards which covered it were rotten and decayed; that, in stepping upon this covering of the cesspool, she sank into it and was injured; that this cover had been repaired with old boards some time before by the defendant's direction; and that the defendant was present when this was done. *Held*, that this evidence should have been submitted to the jury. *Cowen* v. *Sunderland*, 363.

See ACTION, 1, 2.

LAW AND FACT.

See ACTION, 6; FRAUDULENT REPRESENTATION, 2, 3; INNKEEPER; LORD'S DAY, 3; MALICIOUS PROSECUTION; POOR DEBTOR, 5; RAILROAD, 11, 12; WAY, 3, 4.

LEASE.

1. A lease of "the first floor" in a building includes the outside of the front wall of that part of the building, if there is nothing in the lease to control such construction. *Lowell* v. *Strahan*, 1.
2. An agreement by the lessee of a building to allow a third person, in consideration of an annual payment by him, to place a sign upon the outside wall of the building, for a stated time, is not a breach of a covenant in the lease not to underlet any part of the premises. *Ib.*
3. The owner of a mill-pond executed an instrument under seal, whereby he leased, demised, and let "the sole and exclusive right to cut and carry away" from said pond "all such ice as can be so cut in form and shape to use either for private use or as merchandise," the lessor reserving to himself the right to cut all ice needed for his own use. *Held*, that the interest of the lessee was not a mere revocable license, and that he could maintain an action against one who, without right, entered upon the pond, and cut ice therefrom. *Richards* v. *Gauffret*, 486.

See ACTION, 1; EQUITY, 1; RAILROAD, 9.

LEGACY.

See DEVISE AND LEGACY.

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LIBEL.

The declaration in an action for libel alleged, in the first count, that the defendant falsely and maliciously accused the plaintiff of conspiring with P. to defraud the neighbors and friends of the plaintiff and P.; and that the defendant caused said false and malicious libel to be published in a certain newspaper, as follows: "As to the E. Company, I doubt not all are willing it should pay a fair dividend, six per cent, even ten per cent, on the actual value of the plant. Here comes the rub, when the N. Company was capitalized for $40,000 its actual value was not $15,000. It was a plan for the T. Company to make a good sale, as no profit could be made with the sharp, bitter competition of the S. Company in the field, and it was a scheme by which certain parties (meaning the plaintiff and said P.) attempted to make $20,000 or more by buying a property worth in the neighborhood of $15,000 and capitalizing it for $40,000, and by selling stock to their neighbors and friends (meaning the neighbors and friends of the plaintiff and said P.) which was more than half water (meaning that more than half of the par value of said stock represented no assets and was of no real value). In fact, the T. plant at the time it was sold and capitalized for $40,000 was not worth near $15,000, as a large sacrifice had to be made, and was made by the projectors (meaning the plaintiff and said P.), who dare not force the loss of removing the S. competition on the stockholders after making 100 per cent and more on the stock sold." The second count alleged that the plaintiff was engaged in business in the city in which the newspaper was published; and that the defendant caused to be published in said newspaper "a false and malicious libel concerning the plaintiff, whereby the plaintiff was greatly injured in his trade, business, and employment;" and set out the publication annexed to the first count. *Held*, on demurrer, that the declaration was insufficient, in failing to apply the alleged libellous words to the plaintiff, or to show in what sense they were used. *McCallum* v. *Lambie*, 234.

LICENSE.

See CONVERSION; INTOXICATING LIQUORS, 7, 9, 18, 20, 21; LEASE, 3.

LIEN.

If the keeper of a livery stable, who, upon learning that a horse in his stable belongs to another person, notifies the owner that the horse is there, and states the amount due for its board, refuses, upon the demand of the owner a few weeks later, to deliver the horse to him unless the whole bill for its board is paid, he waives whatever lien he may have for the board of the horse after the notice to the owner. *Hamilton* v. *McLaughlin*, 20.

See MECHANIC'S LIEN.

LIMITATIONS, STATUTE OF.

1. A. made a promissory note, dated May 25, 1878, and payable to B. one year from date. A. died on March 31, 1884, and an administrator was

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appointed and gave bond on April 7, 1884. Said administrator resigned, and an administrator *de bonis non* was appointed on April 6, 1885. *Held*, in an action on the note against the administrator *de bonis non*, brought on April 5, 1887, that the action was brought within the time allowed by the Pub. Sts. *c.* 136, § 17, and was not barred by the statute of limitations. *Eddy* v. *Adams*, 489.

2. The operation of the statute of limitations upon a promissory note is not, under the Pub. Sts. *c.* 197, § 11, suspended by the temporary absence of the maker from the State, but only by absence of such a character as works a change of his domicil. *Slocum* v. *Riley*, 370.

3. If the holder of a valid promissory note, signed in behalf of the town by its treasurer, surrenders it to the treasurer and takes from him a new note in renewal, on his assurance that he has authority to bind the town by the renewal, when, in fact, he has not such authority, the treasurer's conduct is not a fraudulent concealment by the town of the cause of action, within the Pub. Sts. *c.* 197, § 14, and an action cannot be maintained on the old note, which is not brought within six years after the cause of action upon it accrued. *Abbott* v. *North Andover*, 484.

See COLLATERAL SECURITY, 1; EQUITY, 6; ESCAPE, 2; PLEADING, III.

LORD'S DAY.

1. A complaint on the Pub. Sts. *c.* 98, § 2, for unlawfully keeping open a shop on the Lord's day, need not negative the exceptions contained in the St. of 1887, *c.* 391, § 2. *Commonwealth* v. *Shannihan*, 99.

2. A person who keeps open a shop on the Lord's day for the purpose of selling therein bread and pastry, not made by him, but bought for the purpose of resale, is not a "baker," within the meaning of that word in the St. of 1886, *c.* 82, although he has a small stove in his shop in which his wife sometimes bakes a few cookies or ginger-snaps, which he sells; and he may be convicted, under the Pub. Sts. *c.* 98, § 2, of keeping open his shop for the purpose of doing business therein. *Commonwealth* v. *Crowley*, 430.

3. It cannot be ruled, as matter of law, that the work of shaving an aged and infirm person in his own house on the Lord's day is not a work of necessity. *Stone* v. *Graves*, 353.

MALICIOUS PROSECUTION.

In an action for malicious prosecution it appeared that the plaintiff had been arrested, on a complaint made by the defendant, for fraudulently concealing mortgaged property. At the trial, material facts were in dispute, and it did not appear that a full and correct statement of the facts as known to the defendant was made to his counsel. There was also evidence that the defendant believed, before making the complaint, that the property had been wrongfully removed by a third person. *Held*, that the defendant had no ground of exception to a refusal of the judge who presided at the

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trial to rule that whether or not there was probable cause was a question of law for the court, nor to his refusal to rule that there was no evidence of want of probable cause. *Donnelly* v. *Daggett*, 314.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. In an action for personal injuries occasioned to the plaintiff's intestate by the breaking of a machine upon which he was employed by the defendant, the evidence showed that the intestate was found, about ten minutes after the accident, with his body crushed and his bowels disrupted, and that, although breathing, he was unconscious, and died almost immediately in that state. The judge ruled that there was evidence to warrant the jury in finding that a cause of action accrued to the intestate in his lifetime, and survived to his personal representative; that there was no evidence to warrant the jury in finding that the deceased endured any conscious pain or suffering, and that the plaintiff was only entitled to recover nominal damages. *Held*, that the rulings were not inconsistent, and were correct. *Mulchahey* v. *Washburn Car Wheel Co.* 281.
2. Machinery upon which a servant was employed became defective and dangerous. The master promised the servant that the defect should be remedied. The servant continued to attend to the machinery, knowing that the defect had not been remedied, and sustained an injury by reason of the defect. *Held*, in an action by him against the master for the injury, that the plaintiff was not entitled to a ruling that, on these facts, the defendant was liable. *Counsell* v. *Hall*, 468.

See EVIDENCE, 9; INTOXICATING LIQUORS, 15, 16, 29.

MECHANIC'S LIEN.

Under the Pub. Sts. *c.* 191, § 6, providing that a mechanic's lien shall be dissolved unless the person desiring to avail himself thereof files in the registry of deeds a statement including the name of the owner of the property, if known, the fact that, when ignorant of the owner's name, he sets forth in his statement that he believes A. to be the owner, does not prevent his maintaining a petition against B., who is in fact the owner. *McPhee* v. *Litchfield*, 565.

See HUSBAND AND WIFE, 1.

MEMORANDA.

Resignation of Mr. Justice Gardner, 55.
Appointment of Mr. Justice Knowlton, 78.
Death of Mr. Justice Soule, 593.

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MISTAKE.

See EQUITY, 2; INTOXICATING LIQUORS, 10, 11; JUDGMENT, 2.

MORTGAGE.

I. *Real Estate.*

See ACTION, 2; NOTARY PUBLIC; TRUST AND TRUSTEE, 1.

II. *Personal Property.*

1. On October 12, A. made to B. a mortgage of "all the personal property described in a mortgage given by me to C.," reciting that "said mortgage has never been discharged, and said C. still holds the same," and covenanting that said property was free from all incumbrances, "except so far as the aforesaid mortgage may be an incumbrance thereon." On October 13, A. made to B. another mortgage of "the same property described in a mortgage from grantor to grantee," dated October 12, "and said property is subject to the incumbrances mentioned in said prior mortgage to grantee." On October 17, A. made to B. a third mortgage of "all the personal property previously mortgaged to grantee by mortgage dated October 13, to which reference is had for a description," and covenanting that the property was free from all incumbrances, "except a mortgage to C. upon which there is nothing owing or due, and two prior mortgages to grantee." *Held*, that the mortgage of October 17 only conveyed to B. the mortgagor's right of redemption from the mortgage to C., and was subject to the mortgage to C., although the latter mortgage had not been recorded. *Eaton* v. *Tuson*, 218.
2. In an action of tort by a mortgagee of personal property, against an officer who had attached the goods as the property of the mortgagor, it appeared that the mortgage was conditioned to pay the sum of $1000 in one year, "as stated in my notes dated" a certain day; and that the demand, made in pursuance of the Pub. Sts. *c.* 161, § 75, on the defendant, was to pay the sum of $1000, "being the amount of two notes of $500 each, indorsed by me for the accommodation of" the mortgagor. *Held*, that oral evidence was admissible to show that the mortgage was intended to indemnify the plaintiff against liability as indorser of two notes of $500 each, signed by the mortgagor; and that the action could be maintained although the notes originally given had been renewed by other notes, also signed by the mortgagor and indorsed by the plaintiff, on delivery of which to the bank discounting the original notes the latter had been delivered to the mortgagor. *Bigelow* v. *Capen*, 270.
3. A demand in writing, made, under the Pub. Sts. *c.* 161, § 75, by a mortgagee of personal property upon an attaching officer, is not invalidated by including in the sum demanded the amount paid by the mortgagee for costs of protest of the promissory note secured by the mortgage, if the property attached is insufficient to pay more than the note alone. *Ib.*
4. In an action by an assignee of a mortgage for the conversion of two horses, against an officer, who attached one of the horses as the property of the mortgagor on a writ in favor of one creditor, and the other horse on

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another writ in favor of another creditor, the demand made by the plaintiff, under the Pub. Sts. c. 161, § 75, stated that he held a mortgage for $492, then due, upon the two horses, and referred to the records of a town for further particulars, without stating when the mortgage was given, or by whom, or to whom. The mortgage purported to secure payment of a note for $650, and interest, but did not show when the note would become due, or the rate of interest. The note was payable six months after date, with interest at the rate of three per cent a month. The mortgage and note were made to a third person, and were assigned to the plaintiff a short time before the attachment. By an arrangement between the plaintiff and the mortgagor, a part of the mortgaged property was sold, and the proceeds applied to the payment of $25 to the plaintiff as a commission, the interest for six months in advance, and $158 upon the principal. *Held*, that the demand was insufficient. *Wilson* v. *Crooker*, 571.

See CORPORATION, 1; EQUITY, 2; ESTOPPEL.

MOTION TO QUASH.

At the trial of an indictment in several counts for forging and uttering twelve bills of parcels, the defendant filed a motion to quash the indictment, but, instead of arguing the motion at the outset, consented that the court should reserve all his rights under it, with the understanding that it would be disposed of at a later stage of the case. After the case for the government was closed, the motion to quash was argued, and the presiding judge quashed several of the counts of the indictment; but refused to strike out the evidence introduced under these counts. *Held*, that, if the evidence was admissible under the remaining counts, the defendant had no ground of exception. *Commonwealth* v. *White*, 392.

See COMPLAINT, 4.

NAME.

See COMPLAINT, 5; ELECTION, 2; VARIANCE.

NATIONAL BANK.

See EQUITY, 5, 6.

NEGLIGENCE.

See ACTION, 3, 6; INNKEEPER; MASTER AND SERVANT, 2; RAILROAD, 11, 12; SCHOOL; WAY, 3, 4, 7.

NEW TRIAL.

If the declaration in an action contains counts in contract and counts in tort, and the plaintiff, by order of the judge, elects to proceed to trial on the counts in tort, the refusal of the judge to order the counts in contract stricken from the record is no ground for a new trial. *Reeve* v. *Dennett*, 23.

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NOLLE PROSEQUI.

See AUTREFOIS ACQUIT OR CONVICT.

NOLO CONTENDERE.

See RECORD, 4.

NOTARY PUBLIC.

Under the Pub. Sts. *c.* 18, § 1, and *c.* 181, § 2, the certificate of an entry made for the breach of a condition of a mortgage may be sworn to before a notary public. *Murphy* v. *Murphy*, 224.

NOTICE.

See INTOXICATING LIQUORS, 33; LIEN; PARTNERSHIP; PAUPER, 1; POOR DEBTOR, 1, 2, 5, 6; WAY, 5, 8–11.

NUISANCE.

See EQUITY, 4.

OFFICER.

See ESCAPE; MORTGAGE, 2–4; PLEADING, III.

PARENT AND CHILD.

See INTOXICATING LIQUORS, 31, 32, 34; WAY, 4.

PARTNERSHIP.

A. and B. were in partnership under the name of B. and Company. B. withdrew from the firm, and A. carried on the business under the same firm name. Subsequently, A. sent to C., with whom the former partnership had had dealings, a letter with the printed heading, "A., under firm name of B. and Company." This letter was received by C. *Held*, that this heading was admissible in evidence on the issue whether C. had notice of the withdrawal of B. from the firm. *Swift* v. *Carr*, 552.

PAUPER.

1. An action against a town for relief furnished a pauper cannot be maintained under the Pub. Sts. *c.* 84, § 27, except upon evidence of an express and formal notice to the overseers of the poor of the town, and a distinct request to them that the pauper be provided for. *O'Keefe* v. *Northampton*, 115.
2. An action founded upon an implied contract will not lie against a town for relief furnished a pauper. *Ib.*
3. In an action against a town for relief furnished a pauper, there was evidence that one of the overseers of the poor, in the absence of his associates,

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agreed to pay the plaintiff (a married woman then living with her husband, and with whom the husband's father, a pauper, was then living) to take care of the father as long as he lived; that the father lived there until his death; and that the town paid the husband by the month for his support. *Held*, that the evidence was not sufficient to maintain the action. *O'Keefe* v. *Northampton*, 115.

4. In an action by one town against another town for relief furnished a pauper, evidence is inadmissible, on the issue whether the pauper had his domicil in the defendant town, that, at a previous time, the overseers of the poor of the defendant town, on being notified by a third town that the pauper was in need of relief, took the pauper to their town and furnished such relief. And the fact that the records of the defendant town have been destroyed by fire does not make the evidence admissible. *South Scituate* v. *Stoughton*, 535.

PAYMENT.

See COLLATERAL SECURITY, 2; ESTOPPEL; MORTGAGE, 2; PROMISSORY NOTE, 5, 6.

PLEADING.

I. *Parties to Action.*

See ARBITRAMENT AND AWARD.

II. *Declaration.*

See LIBEL; NEW TRIAL.

III. *Answer.*

In an action against an officer for negligently suffering the escape of a person whom he had arrested upon a writ sued out by the plaintiff, if the defendant relies, in mitigation of damages, upon the fact that the plaintiff's debt against the escaped person is barred by the statute of limitations, he is not required to set up such defence in his answer. *Slocum* v. *Riley*, 370.

See INSURANCE, 1, 2.

PLEDGE.

See COLLATERAL SECURITY, 2, 3; EQUITY, 5, 6; FRAUDULENT REPRESENTATION, 4.

POLICE COURT.

See RECORD, 4.

POOR DEBTOR.

1. Under the Pub. Sts. *c.* 162, § 18, requiring that the notice issued to a debtor, to appear and submit himself to examination touching his estate,

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be served by delivering a copy to him or leaving it at his last and usual place of abode, "allowing not less than three days before the time fixed for the examination, and at the rate of one day additional for every twenty-four miles' travel," if the debtor lives fifteen miles distant from the place fixed for the examination, the service of the notice upon him there must be made at least fifteen hours before the beginning of the third day from the day fixed for the examination. *Lane* v. *Holman*, 221.

2. If the service of notice to a debtor to appear and submit himself to examination touching his estate does not give him the full time allowed by the Pub. Sts. *c.* 162, § 18, and he does not appear in obedience to the notice, and is defaulted, the magistrate has no authority to annex his certificate to the execution authorizing the arrest of the debtor; and, as against the creditor causing the arrest, his arrest thereon is illegal. *Ib.*
3. A debtor, who has been illegally arrested, does not, by recognizing before a magistrate other than the one authorizing the arrest, and submitting to examination and taking the oath for the relief of poor debtors, waive the illegality of the arrest. *Ib.*
4. The expenses incurred by a debtor, who has been illegally arrested, in submitting himself to examination for the purpose of taking the oath for the relief of poor debtors and taking the oath, having previously been discharged from imprisonment upon entering into a recognizance to appear for such examination, are not elements of damage in a subsequent action for the illegal arrest. *Ib.*
5. In an action upon a poor debtor's recognizance, entered into under the Pub. Sts. *c.* 162, § 28, if the service upon the creditor of notice of the debtor's desire to take the oath for the relief of poor debtors is insufficient, by reason of the fact that the officer read the notice to the creditor instead of giving him a copy of it, but it appears that the creditor told the officer that he understood the notice and would attend the hearing appointed for the examination of the debtor, the question whether the creditor waived due service of the notice should be submitted to the jury. *Goldenberg* v. *Blake*, 354.
6. The service upon the creditor's attorney of the original notice of the desire of a person arrested on execution to take the oath for the relief of poor debtors is, so far as the rights of the creditor are concerned, a sufficient compliance with the requirement of the Pub. Sts. *c.* 162, § 32, that such notice shall be served by giving to the creditor, his agent or attorney, "an attested copy thereof." *Callaghan* v. *Whitmarsh*, 340.

PRESCRIPTION.

See RAILROAD, 3–6.

PRESUMPTION.

A man left his wife and family in August, 1871, to seek work. His wife heard from him only twice after he left, the last time being about three weeks after so leaving, and she never heard of him again, though she made

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inquiries. At the time he left, his health was "fair," although he was then "drinking hard," and had been for some years. *Held*, that these facts were sufficient to raise a presumption of fact that he died before June 21, 1881. *Stockbridge, petitioner*, 517.

See CRUELTY TO ANIMALS, 3; INTOXICATING LIQUORS, 29.

PRINCIPAL AND AGENT.

See BANKRUPT; COLLATERAL SECURITY, 3; HUSBAND AND WIFE, 1, 2; INTOXICATING LIQUORS, 3–5, 24, 25, 28, 29; TRUSTEE PROCESS.

PRINCIPAL AND SURETY.

The surety on a joint and several bond, executed to a husband by his wife as principal, cannot avail himself, in defence to an action against him upon the bond, of the incapacity of the principal to contract with her husband. *Winn* v. *Sanford*, 302.

See EQUITY, 5, 6; RECOGNIZANCE.

PROBATE COURT.

If, under the St. of 1885, *c.* 376, the judge of probate directs the amount of a legacy to be deposited in a savings bank, on the representation of the executors that the residence of the legatee is unknown, and it afterwards appears that the legatee died before the testator, and that his issue are entitled to it, under the Pub. Sts. *c.* 127, § 23, the judge of probate should order the amount to be paid to such issue. *Stockbridge, petitioner*, 517.

See APPEAL, 1.

PROMISSORY NOTE.

1. In an action on a promissory note, payable to A. and purporting to be signed by B. by his mark and to be witnessed, on the issue of the genuineness of the defendant's signature, the attesting witness testified that A. and B. were in the room adjoining the one he was in, the door being ajar; that A. wrote the note and read it to B.; that he was then called in to witness the note; that A. said, "This is B. who is giving his note, and I want you to witness it;" and that the witness then took the pen out of B.'s hand, read the note, and then witnessed it. *Held*, that the testimony was sufficient to warrant the jury in finding that B. duly signed the note. *Whitney* v. *Clary*, 156.
2. When the signature to a promissory note is proved, the note itself is *prima facie* evidence of consideration. *Ib.*
3. In an action on a promissory note, to which the defence was want of consideration, it appeared that the payee held a note of a son of the maker, and that the maker was the administrator of his son's estate and his only heir, and gave the note in suit in renewal of the old note. *Held*, that, even if the old note could not have been enforced at law at the time the

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new note was given, there was sufficient evidence of consideration for the new note. *Whitney* v. *Clary*, 156.

4. In an action by the payee against the maker of a promissory note, it is no defence, that the defendant, a married woman, was induced to sign the note by threats made to her by her husband, if the payee took the note in ignorance thereof. *Fairbanks* v. *Snow*, 153.
5. If a guarantor of a promissory note makes a payment thereon, upon the agreement that the payee shall hold the note as security to him for the amount paid as well as for the balance remaining due the payee, such payment does not *pro tanto* discharge the maker of the note. *Granite Bank* v. *Fitch*, 567.
6. In an action against A. on a promissory note signed by A. and B., it appeared that B. sent his promissory note to the payee for the amount due, and that this note was not discounted or paid, nor accepted by the payee in discharge of the original note. *Held*, that the transaction did not amount to a payment of the original note. *Ib.*

See COLLATERAL SECURITY, 2, 3; ESCAPE, 2; ESTOPPEL; LIMITATIONS, STATUTE OF; MORTGAGE, 2; TOWN, 2.

QUIETING TITLE.

1. At the hearing upon a petition, under the Pub. Sts. *c.* 176, to compel the respondent to bring an action to try his alleged title to a parcel of land, the question of title to the land cannot be adjudicated, but only the question whether the petitioner has shown that he is in possession of the land, claiming an estate of freehold therein. *Orthodox Congregational Society* v. *Greenwich*, 112.
2. At the hearing upon a petition, brought in 1885, under the Pub. Sts. *c.* 176, by a religious society, to compel the town in which it was located to try its alleged title to the land on which the meeting-house stood, it appeared that the meeting-house was built in 1828 by the town upon a portion of the common belonging to the town; that, by a vote of the town, it was "to be used as a town-house and place for public worship," and the town held its meetings in it up to 1855, when a new town-house was built; that, during this period, several religious societies occupied the building on Sundays by permission of the town; that, since 1855, the building had not been used for the general purposes of a town-house; that the audience-room had been used for religious services solely, except that since 1880 it had been used on seven or eight occasions for public entertainments; that the town had from time to time expended money for repairs of the meeting-house, both inside and outside; that after 1855, as before, the petitioner, since its incorporation in 1865, and the religious society which preceded it, occupied the audience-room by the permission of the town; that the town kept up the old customs of ringing the bell at noon and of tolling it when deaths occurred; and that it had always had access to the vestibule of the meeting-house for these purposes. There was no evidence that this was by the permission of the petitioner, and no evidence of any ouster of the town by the petitioner; and no claim of title adverse to the

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town was made by the petitioner until 1885, when it voted to contest any claim made to the meeting-house adverse to the petitioner. *Held*, that the petitioner had not shown such an exclusive possession as entitled it to maintain the petition. *Orthodox Congregational Society* v. *Greenwich*, 112.

RAILROAD.

1. Under the Gen. Sts. *c.* 63, § 45, providing that, after a railroad "corporation has by virtue of its charter taken land or other property for the purpose of its road, it shall, before proceeding to construct the road, furnish a plan of the land to the owner," and that, if such plan is not so furnished, all the rights of the corporation to enter upon or use such land, except for making surveys, shall be suspended until it has delivered a plan, the failure to deliver a plan of land taken does not invalidate the taking; and a person whose land has been taken cannot, after the road has been completed and has been in use for nearly twenty years, object to such use on the ground that no plan has been furnished him. *Abbott* v. *New York & New England Railroad*, 450.
2. Although the power to take land by the right of eminent domain which has been granted by the Legislature to a domestic railroad corporation will not pass to a foreign corporation, which by deed succeeds to the rights and powers of the domestic corporation, without the assent of the Legislature, such assent may be gathered by implication from a series of acts of the Legislature. *Ib.*
3. A private right of way across the location of a railroad may be acquired by prescription, notwithstanding the St. of 1853, *c.* 414, § 4, (Pub. Sts. *c.* 112, § 195,) imposing a penality on any person who, without right, knowingly stands or walks on any railroad track, and the St. of 1874, *c.* 372, § 151, (Pub. Sts. *c.* 112, § 198,) imposing a penalty on a person who, without the consent of the corporation, rides or drives a horse on a railroad. *Turner* v. *Fitchburg Railroad*, 433.
4. In an action against a railroad corporation for obstructing a prescriptive right of way across the location of the defendant, it is no defence that, after the way was used, a statute was passed allowing the corporation to relocate its road, and for that purpose, under proper proceedings, to take lands, in the absence of evidence that such proceedings were had. *Ib.*
5. On the issue whether a right of way by prescription has been acquired over the location of a railroad corporation, an agreed statement of facts stated that the plaintiff and his grantors had used the way openly, adversely, and uninterruptedly for more than twenty years. *Held*, that the court might assume that the defendant had knowledge of the acts of user. *Ib.*
6. In an action against a railroad corporation for obstructing a right of way claimed to exist by prescription over the defendant's location, the declaration alleged that the defendant erected a fence across the way, and placed upon the way stones, earth, gravel, ties, and iron rails. The case was submitted to the court on agreed facts, which stated that the acts of the defendant declared on were done upon its land "in the construction and

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maintenance of its railroad, which it was authorized by law to construct and maintain." *Held*, that this was not to be construed to mean that the acts done by the defendant were done as a part of the necessary repair of its road. *Turner* v. *Fitchburg Railroad*, 433.

7. The Pub. Sts. *c.* 112, § 214, providing that a railroad corporation shall be responsible in damages to a person whose buildings or other property may be injured by fire communicated by its locomotive engines, do not apply to goods delivered to a railroad corporation as a carrier, and in its custody as a warehouseman, at the time of such a fire. *Bassett* v. *Connecticut River Railroad*, 129.

8. If goods, which have been transported over a railroad, and have been received by the owner and placed in a storehouse, occupied exclusively by him and owned by the corporation, adjoining its freight depot at a station, and other goods therein intended for transportation, but not having been delivered to the corporation, are destroyed by fire communicated by its locomotive engine, the owner may maintain an action against the corporation, under the Pub. Sts. *c.* 112, § 214, for the loss of the goods. *Blaisdell* v. *Connecticut River Railroad*, 132.

9. A street railway corporation was made liable by its charter for any injury that any person might sustain by reason of any carelessness, negligence, or misconduct of its agents and servants, in the management, construction, or use of its tracks. Subsequently, the corporation leased to another street railway corporation a certain portion of its track for the unexpired term of its charter, subject to all duties and liabilities imposed upon the lessor by its charter, and the lessee covenanted to assume and perform them, and to defend any suits brought against the lessor arising out of the operation and use of the road, and to pay any judgment recovered against the lessor. The lessee further agreed to deliver the property to the lessor at the end of the term, and there was a provision for reëntry for breach of covenant. The lease was afterwards ratified by an act of the Legislature. After this, a passenger on a car of the lessee while on the leased road was injured by the negligence of a servant of the lessee. *Held*, that an action could be maintained against the lessor for such injury. *Braslin* v. *Somerville Horse Railroad*, 64.

10. In an action against a railroad corporation for an assault and false imprisonment, it appeared that the plaintiff, who was the holder of a mileage coupon ticket, tendered, while a passenger on a train on the defendant's railroad, some of the coupons in payment of his fare, in violation of the conditions of the contract under which he held them; and that the conductor of the train refused to receive them, and arrested him. The plaintiff at the trial asked the judge to rule that the evasion or attempt to evade the payment of fare, for which a passenger may be lawfully ejected or removed from a railroad car must be a fraudulent evasion, with an intention to defraud the railroad company. The judge refused so to rule, but did rule that the coupons offered by the plaintiff to the conductor were not a legal tender of his fare, and that, upon the plaintiff's refusal to make any other payment, the conductor, who was a railroad police officer, might arrest him without a warrant. The plaintiff excepted to the refusal to

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rule as requested, but not to the ruling given. *Held*, that the words "ejected or removed" in the ruling requested were not to be construed as meaning "removed by arrest." *Marshall* v. *Boston & Albany Railroad*, 164.

11. At the trial of an action of tort, brought by an administrator, under the Pub. Sts. *c.* 112, § 213, against a railroad corporation, for the death of the plaintiff's intestate, caused by a collision between a locomotive engine of the defendant and a wagon in which the intestate was driving, at a place where the highway crossed the railroad at grade, there was evidence that between two and three o'clock in the morning the intestate delivered milk to a customer who lived a quarter of a mile from the crossing, and that he had another customer near the crossing on the farther side; that his wagon was more than half-way over the crossing, which was one hundred and sixty-eight feet wide, when the gateman cried, "Stop," and shut the gates; that the intestate whipped up his horse, the gateman told him to come on and opened the gate, and the wagon was struck by the locomotive engine, and the intestate instantly killed; and that no bell was rung or whistle sounded on the locomotive. *Held*, that the evidence would warrant an inference that the intestate was awake when approaching the crossing, and a finding that the neglect to ring the bell or sound the whistle contributed to the injury; and that the court could not rule, as matter of law, that the intestate was guilty of gross negligence. *Doyle* v. *Boston & Albany Railroad*, 386.

12. In an action for personal injuries sustained by the plaintiff, by reason of the carriage in which he was driving being struck by a car on the defendant's railroad at a place where it crossed a way at grade, there was evidence that the car, which was slowly descending an incline by the force of gravity, was in charge of a brakeman, and could have been stopped in a short distance if the brake had been applied. There was also evidence that the plaintiff was driving at a moderate trot; that, as he approached the crossing, his head was turned towards the side from which the car was approaching; that the hind wheel of the carriage alone was struck; that as the carriage approached the crossing it was visible from the car; and that cars did not ordinarily run at that time. The plaintiff was so injured that he was unable to give any account of the occurrence. *Held*, that there was evidence proper to be submitted to the jury on the questions whether the plaintiff was in the exercise of due care, and whether the defendant was negligent. *Cleaves* v. *Pigeon Hill Granite Co.* 541.

13. Under the Pub. Sts. *c.* 112, § 206, the throwing of a missile at a car is a punishable offence, whether the car was in use at the time or not. *Commonwealth* v. *Carroll*, 408.

See COMPLAINT, 4; EVIDENCE, 2; INDICTMENT; TRIAL, 3.

RECEIPT.

1. A receipt, under seal, given by the obligee of a joint obligation to one of the joint obligors, "in full satisfaction for his liability" on said joint obligation, releases all of the obligors; and oral evidence is inadmissible

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to show that the obligee did not intend to release them all. *Hale* v. *Spaulding*, 482.

2. A written instrument, given to a selectman of a town by a person who has been injured in his person and property by reason of a defect in a highway in the town, and reciting the receipt from such selectman, for the town, of a certain sum "in full for all demands for damages sustained on the highway," is a bar to an action by such person against the town for his personal injuries; and oral evidence is inadmissible, in the absence of fraud, to show that he understood the sum paid as intended in settlement of the damage to his property only, and that it was agreed between him and the selectman that, if it appeared that he had been injured in his person, he should be paid something more. *Squires* v. *Amherst*, 192.

3. On a petition, under the Pub. Sts. *c.* 49, §§ 79, 105, for the assessment of damages caused by taking land for a town way, and damages to the petitioner's house caused by the taking, there was evidence that the petitioner could not read, and that the road commissioners of the town knew of his inability; that before filing his petition he had accepted an award of $200 for damages, and had put his mark to a receipt acknowledging full payment of all claims, but which he understood at the time, and declared, to be for the land alone; that the road commissioners expressed no dissent, but said that "that would be all right;" that the petitioner, on learning what he had signed, repudiated the transaction, tendered the money back to them, giving them a notice addressed to the town, and left the money and the notice in the hands of the town treasurer. *Held*, that the receipt was not a bar. *O'Donnell* v. *Clinton*, 461.

4. If a town authorizes its road commissioners to pay a certain sum in full for all damages sustained by an owner of land caused by the taking of his land for a town way, and the commissioners pay the money and take a receipt under such circumstances that their act amounts to constructive fraud, the town cannot, on a petition for the assessment of damages for the taking, set up the receipt as a bar to the petition. *Ib.*

See BENEFICIARY ASSOCIATION, 2.

RECOGNIZANCE.

Under the Pub. Sts. *c.* 155, § 58, providing for an appeal from the sentence of a trial justice to the Superior Court, and that the appellant shall be committed "until he recognizes to the Commonwealth in such reasonable sum and with such sureties as the justice requires," the magistrate has the right in his discretion to accept as sufficient a recognizance with one surety. *Commonwealth* v. *Bisch*, 375.

See RECORD, 2.

RECORD.

1. It is no ground for an arrest of judgment in a criminal case, that the copy of the record transmitted to the Superior Court by the trial justice who tried the case is attested by him as "justice" only. *Commonwealth* v. *McParland*, 378.

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2. The copy of the record of a trial justice in a criminal case, transmitted to the Superior Court, recited that the defendant was adjudged guilty, and appealed to the term of the Superior Court next to be held for the county, and was ordered to recognize to appear and prosecute his appeal. It did not state that the defendant recognized, but it was accompanied by a copy of the recognizance entered into by the defendant. *Held*, that it sufficiently appeared that the appeal was perfected by a recognizance; and that the Superior Court had jurisdiction of the case. *Commonwealth* v. *Bisch*, 375.

3. The copy of the record of a trial justice in a criminal case, transmitted to the Superior Court, recited that the defendant was adjudged guilty and sentenced on November 22, 1886, from which sentence he appealed to the Superior Court next to be held at C. in and for said county, on the second Monday of February, 1886. *Held*, that the error in the second date furnished no ground for quashing the complaint or for an arrest of judgment. *Ib.*

4. The record of a police court, to which a complaint was made, recited that the defendant, "being asked whether he is guilty or not of the offence within charged upon him, pleads *nolo contendere*, but, after hearing divers witnesses duly sworn to testify the whole truth, and fully understanding the defence of said defendant, it is adjudged by the said court that said defendant is guilty of said offence;" and that the defendant was sentenced, and appealed therefrom to the Superior Court. *Held*, that the record did not sufficiently show that the defendant's plea was accepted by the court, and sentence passed thereupon; and that the defendant had the right to plead anew in the Superior Court, and to have a trial by jury. *Commonwealth* v. *Ingersoll*, 381.

RELEASE.

See RECEIPT.

RELIEF ASSOCIATION.

See BENEFICIARY ASSOCIATION.

RESERVATION.

See DEED.

RIVER.

See ACTION, 4; STATUTE, 1.

RULES OF COURT.

See EQUITY, 8.

SALE.

See EQUITY, 2; INTOXICATING LIQUORS, 1–7, 31, 32; WARRANTY.

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SCHOOL.

Under the Pub. Sts. *c.* 44, § 46, which imposes upon the school committee of a town, unless the town otherwise directs, the duty of keeping "the school-houses in good order," and of providing "all things necessary for the comfort of the scholars," the committee may lawfully order a tree on a school-house lot to be cut down; and they are not liable for the negligence of those whom they employ to execute their order. *McKenna* v. *Kimball*, 555.

See TAX.

SEARCH-WARRANT.

A warrant to search for and seize intoxicating liquors, issued under the Pub. Sts. *c.* 100, § 30, in the form prescribed by § 46, may be executed in the night-time. *Commonwealth* v. *Hinds*, 182.

SELECTMEN.

See TOWN, 1.

SETTLEMENT.

See PAUPER, 4.

SHIP.

The provisions of the U. S. St. of June 26, 1884, *c.* 121, § 18, providing that the individual liability of a shipowner shall be limited to the proportion of any and all debts and liabilities that his individual share of the vessel bears to the whole, do not apply to fishing vessels. *Simpson* v. *Story*, 497.

SIGNATURE.

See PROMISSORY NOTE, 1, 2.

SLANDER.

See COSTS.

SPECIFIC PERFORMANCE.

See EQUITY, 1.

STATUTE.

1. The Sts. of 1871, *cc.* 285, 362, authorizing certain persons to construct booms across the Connecticut River, in such a way as not to obstruct the lumber of other persons, did not repeal by implication the Gen. Sts. *c.* 78, § 5, prohibiting the floating of logs on the said river unless the logs are formed into rafts. *French* v. *Connecticut River Lumber Co.* 261.

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2. The Pub. Sts. *c.* 104, § 14, as amended by the St. of 1882, *c.* 208, requiring safeguards to elevator openings, do not make the owner of a building who does not comply with their provisions liable to a person injured by falling down an elevator well, in the absence of evidence that the act has been accepted by the city in which the building is located. *Handyside* v. *Powers*, 123.

See CIVIL SERVICE; CONSTITUTIONAL LAW; NOTARY PUBLIC; RAILROAD, 7, 8; SHIP; TRIAL, 1, 3, 4.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

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STREET RAILWAY.

See INDICTMENT; RAILROAD, 9.

SUBROGATION.

See EQUITY, 5.

SUPERIOR COURT.

See APPEAL, 2; COMPLAINT, 3; COUNTY COMMISSIONERS; EXCEPTIONS, 1; RECORD, 2; WARRANT.

SUPREME JUDICIAL COURT.

See APPEAL, 1; EXCEPTIONS, 1.

SURETY.

See PRINCIPAL AND SURETY.

SURVEYOR OF HIGHWAYS.

See EQUITY, 4; TOWN, 1.

TAX.

An institution organized under the Pub. Sts. c. 115, for the education of boys, owned a large farm, on which were the school buildings, two farm-houses, barns, and other buildings adapted for farm purposes, and live stock. The scholars, in addition to attending school, were required to work on the farm two or three hours a day, and were taught agriculture. The price of board and tuition was $100 a year for each scholar. The products of the farm and the live stock were for the most part consumed in furnishing food for the scholars, but others were sold or bartered and the proceeds applied to the maintenance of the school. *Held*, that, under

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the Pub. Sts. *c.* 11, § 5, *cl.* 3, the whole of the property of the institution was exempt from taxation. *Mount Hermon School* v. *Gill*, 189.

See CONSTITUTIONAL LAW.

TENANT IN COMMON.

An action of tort to recover the forfeiture prescribed in the Pub. Sts. c. 179, § 6, cannot be maintained where a tenant in common commits waste in good faith, under an honest belief that he is not a tenant in common. *Jenkins* v. *Wood*, 494.

THREATENING TO ACCUSE OF CRIME.

See VARIANCE.

TOWN.

1. A warrant for a town meeting contained an article "to see if the town will choose the selectmen surveyors of highways," and an article "to choose all necessary town officers," naming those who were to be chosen by ballot, including selectmen, assessors, and overseers of the poor, and adding "all of said votes to be on one ballot." *Held*, that the town might vote to "choose the selectmen surveyors of highways," and "to proceed to ballot for five selectmen who shall also be assessors, overseers of the poor, and highway surveyors." *Held*, *also*, that ballots subsequently cast for separate boards of selectmen, assessors, overseers, and surveyors could be rejected except so far as they contained the names of persons voted for as selectmen; and that they were to be counted for such persons. *Commonwealth* v. *Wentworth*, 50.
2. Under the St. of 1875, *c.* 209, a town treasurer has no right, *virtute officii*, to give a new note of the town in renewal of an old note; and the town is not bound by his assurances as to his authority, or by any custom or usage on his part to act without authority. *Abbott* v. *North Andover*, 484.
3. A committee chosen by a town to erect a building is not a board of public officers, but acts as agent of the town, and it is not obliged to act as a body, but may act by the agreement of the individual members separately obtained. *Shea* v. *Milford*, 528.
4. The St. of 1883, *c.* 119, authorizing a town to build a Memorial Hall, and, for that purpose, to borrow a sum not exceeding $20,000, does not prohibit the town from voting to expend a larger sum upon the building. *Ib.*
5. A committee, appointed by a town to consider location, plans, and estimates, and to make recommendations for a building to be built by the town, recommended a certain location, and the plans and specifications of a certain architect, and reported that the price should not exceed $20,000. This report was accepted by the town and placed on file, and the committee was instructed to receive proposals for a building. Subsequently, the town voted that the report and plans of the committee be adopted,

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and that the same committee build the building. The town also voted to raise by taxation for the purpose the sum of $2,000, and to borrow the sum of $20,000. The specifications reported by the committee were for the entire completion of the building, and stated that no charge should be made for extra work, except it be ordered in writing by the architect. *Held*, that the plan and specifications were adopted by the town as a limitation upon the powers of the committee. *Held*, *also*, that the committee had authority to change the specifications in order to remedy defects in them, and to improve them in minor details, within reasonable limits. *Held*, *also*, that the vote of the town did not prohibit the committee from incurring liabilities for extra work beyond the amount of the appropriation. *Shea* v. *Milford*, 528.

See EQUITY, 4; LIMITATIONS, STATUTE OF, 3; PAUPER; QUIETING TITLE, 2; RECEIPT, 2–4; SCHOOL; WAY.

TRIAL.

1. At the trial of a criminal case, whether the defendant's counsel shall be allowed to read to the jury provisions of the statutes other than those relating to the offence charged, instead of stating them orally, is within the discretion of the presiding judge, to the exercise of which no exception lies. *Commonwealth* v. *Hill*, 305.
2. At the trial of a criminal case, the defendant's counsel, in his closing argument to the jury, used this language: "If you acquit the defendant of this charge, how will you answer the question of your neighbors and friends as to why you did it? You will answer it as your own consciences must feel here. It was not proven. The government failed to convict him." The counsel was interrupted by the judge, who refused to allow him to pursue that line of argument, on the ground that it was improper. *Held*, that the defendant had good ground of exception. *Commonwealth* v. *Brownell*, 319.
3. At the trial of a complaint, under the Pub. Sts. *c.* 112, § 206, for throwing a stone at a car, the judge is not required to give to the jury a definition of the word "stone." *Commonwealth* v. *Carroll*, 403.
4. Under the Pub. Sts. *c.* 153, § 12, the judge presiding at the trial of a criminal case may, before exceptions taken to his rulings are reduced to writing and filed, pronounce them frivolous and intended for delay, and proceed to sentence the defendant. *Commonwealth* v. *Clifford*, 97.

See EXCEPTIONS, 5; NEW TRIAL.

TRIAL JUSTICE.

A person arrested on a complaint for keeping and maintaining a tenement used for the illegal sale of intoxicating liquors was brought before the trial justice who issued the warrant, and pleaded guilty; and the case was continued for sentence to a day certain. On that day, the trial justice ordered the case to be continued *nisi* upon payment of costs by the defendant, to be again called up for sentence upon notice to the defendant. Subse-

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quently, the case was called up on notice to the defendant, and he was sentenced, and took an appeal to the Superior Court. *Held*, that the continuance *nisi* was, under the Pub. Sts. *c.* 212, § 26, made without authority; that the subsequent sentence imposed was of no validity; and that these defences were open to the defendant in the Superior Court, on an appeal by him. *Commonwealth* v. *Maloney*, 205.

See APPEAL, 2; RECOGNIZANCE; RECORD, 1–3.

TROVER.

See CONVERSION.

TRUST AND TRUSTEE.

1. A corporation, having large tracts of unimproved lands, for the purpose of borrowing money to discharge existing liens upon the lands and to make them available for sale, issued bonds, the interest on which was payable semiannually, and, as security for the payment of principal and interest, conveyed its lands to trustees on the following trusts: 1. To permit the corporation to remain in possession, improve and sell the lands, until default should be made in the payment of the bonds, or the interest thereon. 2. To release from time to time from the lien created by the conveyance such portions as, in the opinion of the trustees and of the president of the corporation, might be safely released without impairing the security for the payment of the bonds. 3. To receive and invest the moneys received from the proceeds of sales of said lands, and to pay therefrom interest due on the bonds and the expenses of the trust, and to apply the residue to the purchase and cancellation of the bonds. The deed further provided that, in case default should be made in the payment of the bonds or of the interest thereof, and for six months thereafter, all the bonds should become payable; that the trustees then might, and upon the request of a certain number of the holders of the bonds should, enter and take possession of the granted premises, and should thereafter, as attorneys and agents of the corporation, "so long as said default shall continue," so manage and dispose of the same as to carry out the purposes of the trust, either by sales of the lands in their then existing condition, or by improving the same and thereafter selling them, with the largest discretion as to quantity, time, notice, and mode of sale, as they might deem reasonable and "for the best interests of all parties concerned in the trust;" and that the trustees, after applying any surplus proceeds of sales to the payment of the bonds, "shall restore the residue thereof, and all lands, securities, and other property remaining in their possession after such payment is completed," to the corporation, "and thereupon this trust shall terminate." The corporation covenanted that, in case of default continuing for six months, it would, on the request of the trustees, deliver up possession of the granted premises, and make any further conveyance required; and it was "further mutually agreed that, upon payment of the principal and interest of said bonds, the conveyance herein made, and the

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estate and interests hereby granted" to the trustees, "shall be void," and the right to the lands conveyed should revert to the corporation. *Held*, on a bill in equity by the bondholders, that the provisions of the deed were inconsistent with a right on the part of the trustees to treat the instrument merely as a mortgage, and to foreclose by entry and lapse of time. *Shepard* v. *Richardson*, 32.

2. A woman devised the greater part of her estate to her son and two other persons, in trust that they "may, in the exercise of their discretion, pay" to her husband such portion of the income, "or no portion at all thereof, as they shall from time to time think fitting and proper," and, further, to invest the surplus income, and, at the death of the husband, to convey one half of the trust estate to the daughter of the testatrix or her issue, or, if she should leave no issue, then to the issue of the son, and, at the death of the son, to convey the other half to the issue of the son. The will further provided, that, if either of the recipients under the will should be wanting in thrift, the trustees should make the payments provided for in such way and to such persons as should be most likely to enure to the benefit of the recipients, "exercising in all such case and cases the judgment that would be expected from a good father to each of such recipients respectively." On a petition by the husband for the removal of the son from the office of trustee, a single justice of this court, before whom the hearing was had, found that the son was the dominant member of the board of trustees; that there was a strong mutual hostility between the son and the husband; that he could not satisfactorily apportion the blame for the quarrel, and did not find any misconduct of the son distinctly attributable to hostility; and that, in view of the absolute discretion reposed in the trustees as to the allowance to the husband, and the whole state of affairs disclosed by the evidence, the son ought to be removed, if the husband had a *locus standi*, and unless mutual hostility not attributable solely to the trustee, without distinct proof of misconduct in consequence of it, is never a sufficient ground of removal in such a case. The judge on these findings reported the case for the consideration of the full court. *Held*, that the husband was "beneficially interested in the trust," within the Pub. Sts. *c.* 141, § 9, and had a right to bring the petition; and that, on the facts found, the trustee ought to be removed. *Wilson* v. *Wilson*, 490.

See DEVISE AND LEGACY, 6, 7; EQUITY, 3, 5, 6; EVIDENCE, 7; FOREIGN LAW.

TRUSTEE PROCESS.

In a trustee process, if it appears from the trustee's answers that the trustee owes for washing done by the wife of the defendant under a contract made by the trustee with him, and that the trustee is informed and believes that the defendant, in making the contract, acted as the agent of his wife, and the plaintiff rests his case wholly upon the trustee's answers, the trustee is rightly discharged. *Seward* v. *Arms*, 195.

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USAGE.

See TOWN, 2.

VARIANCE.

An indictment on the Pub. Sts. *c.* 202, § 29, for threatening to accuse Frank E. White of having committed a crime, is not sustained by proof that the person so threatened was Frank A. White, there being no evidence that he was ever called Frank E. White. *Commonwealth* v. *Buckley*, 181.

See ELECTION, 2.

VOTE.

See TOWN, 1, 5.

WAIVER.

See CONTRACT, 5; EQUITY, 7; INSURANCE, 3, 4; LIEN; POOR DEBTOR, 3, 5.

WAREHOUSEMAN.

See RAILROAD, 7, 8.

WARRANT.

An objection to the form of a warrant, issued for the arrest of an accused person by a justice of a district court, for an offence within the jurisdiction of that court, cannot be taken, for the first time, in the Superior Court on appeal. *Commonwealth* v. *Brusie*, 117.

WARRANTY.

If a farmer, not a dealer in provisions, kills a hog and sells it, knowing that the purchaser intends to eat it, there is no implied warranty on the seller's part that the hog is fit for food. *Giroux* v. *Stedman*, 439.

WASTE.

See TENANT IN COMMON.

WATERCOURSE.

See EQUITY, 4; EVIDENCE, 7.

WATERWORKS.

The St. of 1883, *c.* 163, incorporated a water company, for the purpose of furnishing the town of M., or any other town or city, with water. Power was given to take the water of a certain brook in M., to purchase other water sources, to take and hold lands for the purpose of conveying water

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into M., or other town or city, to lay down pipes over any lands, and to enter upon public or private ways under the direction of the authorities of the city or town where such ways are situated. The company was required, when land was taken, to record á description in the registry of deeds of the county in which the lands should be situated. Power was also given to make contracts with M., or with any other town or city, to supply water. It was also provided that the county commissioners for the county in which land taken was situated should require security for damages. The town of M. was given the right to purchase the franchise, and to tax the inhabitants therefor. *Held*, that the company had the right, under the statute, to acquire water rights outside of M. without acquiring any therein, and, for the purpose of conveying water to another town, to take land, although it conveyed no water to M. *Woodbury* v. *Marblehead Water Co.* 509.

See EMINENT DOMAIN; EQUITY, 10.

WAY.

1. Under the Pub. Sts. *c.* 49, § 71, it is sufficient if the laying out of a town way is filed in the office of the town clerk seven days at least before the town meeting at which the laying out is reported by the selectmen and accepted; and the report to the town is not required to be filed seven days before such meeting. *Carr* v. *Berkley*, 539.
2. The laying out of a town way is not invalidated by the fact that one course is stated to be "41½° E." instead of "N. 41½° E.," if there is no ambiguity in the whole description. *Ib.*
3. It cannot be ruled, as matter of law, that a person who is driving a blind horse on a dark and rainy night cannot maintain an action against a town for an injury occasioned by a defect in a highway while so driving. *Brackenridge* v. *Fitchburg*, 160.
4. A child one year and ten months old was sent by his mother into the street in a country village for air and exercise, in the charge of a brother eight years old, who had been accustomed to take charge of him. They went across the street and stood for a time watching some other boys at play, the elder child not having hold of the younger's hand. The younger child, without being noticed by the elder, left his side and started to cross the street alone, and, upon being seen and called by the elder, who ran after him, he ran, fell down, and rolled into a gutter at the side of the street, which had been filled with water for a long time by reason of an obstructed culvert, and received injuries which caused his death. Both of the child's parents and the elder brother knew of the existence of this water. *Held*, in an action against the town, under the Pub. Sts. *c.* 52, § 17, that it could not be ruled as matter of law that the child's parents or his brother were not in the exercise of due care; and that it was competent for the jury to find that the children were travellers on the highway. *Bliss* v. *South Hadley*, 91.
5. In an action against a town for personal injuries occasioned to the plaintiff by a defect consisting of ice on the sidewalk of a street, there was

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evidence that the ice was in substantially the same condition at the time of the injury that it was in immediately after a storm of snow and rain occurring nine days before; that the sidewalk was a frequented one, and was during that time patrolled by a police officer and several times passed by a selectman; and that an attempt to clear the sidewalk, which left it in the condition testified to, was made before the ice was fully formed and more than a week before the injury. *Held*, that the defendant was not entitled to a ruling that there was no evidence for the consideration of the jury that the injury might have been prevented by reasonable care and diligence on the part of the defendant, or that the defendant had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence. *Fortin* v. *Easthampton*, 196.

6. In an action against a city for personal injuries sustained by an alleged defect in a highway, the plaintiff testified, that, while walking on a sidewalk in the city, he struck his foot against some ice on the sidewalk which projected about two inches above the sidewalk, fell, and received the injuries complained of; and that the ice was hobbly, and had the marks of footprints upon it. A witness, who examined the ice the next day, testified that it was about three feet in length, and a foot and a half wide; that the edge, against which the plaintiff testified that he struck his foot, was such as would be formed by anything wearing away a perpendicular surface; and that the ice had apparently been left, when other ice on the sidewalk had been cut away. There was also evidence that snow had fallen on the third, fourth, and fifth days before the accident, but not on the day of the accident or on the day before. *Held*, that there was no evidence to be submitted to the jury on the question whether the proper officers of the city might, by the exercise of reasonable care and diligence, have had knowledge of the defect in time to have remedied it. *Stanton* v. *Salem*, 476.

7. A person, who, while driving along a highway in a town, is injured by reason of his horse taking fright and running against and upon a stone wall two feet in height on the side of the way, may maintain an action against the town, if the injury was received because the wall was not high enough to prevent it, and the want of height rendered it insufficient as a barrier, and the horse was reasonably safe to drive, and the driver was in the exercise of due care and did not lose control of his horse, or lost control for a moment only, and either regained control or would have regained it before the horse ran against the wall, if it had been of sufficient height. *Hinckley* v. *Somerset*, 326.

8. The fact that a stone wall, built by county commissioners on the side of a way in a town, is afterwards rebuilt by the highway surveyor of the town, and remains in the same condition as when rebuilt by him until the happening of an accident by reason of the insufficiency in height of the wall as a barrier, is notice to the town of the existence of the defect. *Ib.*

9. In an action against a town for personal injuries occasioned by a defect in a way, evidence of conversations between a person who has met with a similar accident at the same place and others not officers of the town, con-

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cerning his accident, is not competent to show notice to the town of the existence of the defect. *Hinckley* v. *Somerset*, 326.

10. If a person, who has been injured by a defect in a highway in a town, lives more than ten days in a condition in which it is possible for him to give to the town the notice required by the Pub. Sts. *c.* 52, § 19, and fails to do so, the person named as executor in his will is not entitled, under § 21, to give such notice within thirty days after the death of the testator, but before his appointment as executor. *Nash* v. *South Hadley*, 105.
11. In an action against a town for an injury occasioned by an alleged defect in a way, the notice to the town stated, as the cause of the injury, that the way was "defectively constructed and left in a dangerous and unfinished condition." The plaintiff offered to prove that her foot went into a hole caused by a defective construction of the way. *Held*, that the notice was sufficient, under the St. of 1882, *c.* 36, unless there was an intention to mislead, and the defendant was in fact misled; and that these questions were for the jury. *Liffin* v. *Beverly*, 549.

See DEED; EQUITY, 4; RAILROAD, 3–6; RECEIPT, 2–4.

WIDOW.

See DEVISE AND LEGACY, 8.

WILL.

See CONTRACT, 2; DEVISE AND LEGACY.

WITNESS.

See EVIDENCE, 9; EXCEPTIONS, 6, 7.

WORDS.

"Alter." See *Commonwealth* v. *Mc Gurty*, 257, 260.
"Animal." See *Commonwealth* v. *Turner*, 296, 300.
"Baker." See *Commonwealth* v. *Crowley*, 430, 432.
"Child." See *Taylor* v. *Carroll*, 95, 96.
"Continued." See *Commonwealth* v. *Maloney*, 205, 208.
"Education." See *Mount Hermon School* v. *Gill*, 139, 146.
"Ejected." See *Marshall* v. *Boston & Albany Railroad*, 164, 168.
"Floor." See *Lowell* v. *Strahan*, 1, 8.
"Guest." See *Commonwealth* v. *Moore*, 244, 247.
"Necessary." See *Pyne* v. *Wood*, 558, 560.
"Removed." See *Marshall* v. *Boston & Albany Railroad*, 164, 168.
"Room." See *Lowell* v. *Strahan*, 1, 8.
"Sold." See *Bryan* v. *Traders' Ins. Co.* 389, 391.

WORK AND LABOR.

See FRAUDS, STATUTE OF.

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ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.

Vol. CXXXVIII.

Page 604, 14th line from top, omit "of the questions."

Vol. CXLIV.

Page 491, 3d line from end of the head-note, for "in action" read "in an action."

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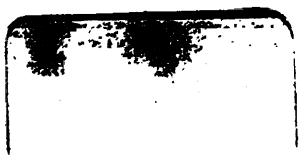
HARVA RARY



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